

IN THE
Supreme Court of the United States

October Term, 1972

No. 71-1637

CITY OF BURBANK, et al.,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., et al.,

Appellees.

**Appeal From the United States Court of Appeals
for the Ninth Circuit.**

**APPENDIX.
VOLUME I.
(Pages 1-428.)**

Jurisdictional Statement Filed June 17, 1972.

Probable Jurisdiction Noted October 10, 1972.

APPENDIX.

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Probable Jurisdiction Noted October 10, 1972.

Relevant Docket Entries.

**United States District Court
Central District of California**

May 14, 1970

**Filed Complaint for Declaratory Relief and In-
junctive Relief.**

June 4, 1970

Filed Defendants' Answer to Complaint.

July 8, 1970

Filed People of the State of California Request To File Brief Amicus Curiae and Order (EC).

July 8, 1970

Filed Motion To Intervene as a Plaintiff by Air Transport Association of America. Filed Statement of No Opposition to Motion To Intervene of Air Transport Association on Behalf of City of Burbank, et al.; filed Pacific Southwest Air Lines Statement of No Opposition to Motion To Intervene of Air Transport Association; filed Lockheed Air Terminal, Inc. Statement of No Opposition to Motion To Intervene of Air Transport Association; filed Order (EC) granting leave to Air Transport Association of America to intervene as a plaintiff. Filed Complaint of Intervening Plaintiff Air Transport Association of America.

July 17, 1970

Filed Defendants' Memorandum of Contentions of Fact and Law. Filed Joint Statement of Contentions of Fact and Law Submitted by Plaintiffs and Intervening Plaintiff. Filed Plaintiffs' and Intervening Plaintiff's Prospective Witnesses. Filed List of Plaintiffs' and Intervening Plaintiff's Trial Exhibits.

July 22, 1970

Filed Answer to Complaint of Intervening Plaintiff Air Transport Association of America.

July 27, 1970

Entered proceedings of pretrial. Pretrial had. Filed Pretrial Conference Order.

Aug. 20, 1970

Filed motion for leave to file Amicus Curiae Brief on behalf of Federal Aviation Administration and order (EC) thereon. Filed Amicus Curiae Brief of the Federal Aviation Administration.

Sept. 14, 1970

Filed Revised List of Plaintiffs' and Intervening Plaintiff's Prospective Witnesses. Filed Revised List of Plaintiffs' and Intervening Plaintiff's Trial Exhibits.

Sept. 15, 1970

Entered proceedings court trial (1st day). Witnesses sworn and exhibits marked. Entered order continuing to 9/16/70, 9:30 A.M. further court trial.

Sept. 16, 1970

Entered proceedings further court trial (2nd day). Witnesses sworn and exhibits marked. Entered order continuing to 9/17/70, 9:30 A.M. further court trial.

Sept. 17, 1970

Entered proceedings further court trial (3rd day). Exhibits marked. Oral argument had. Entered Order matter to "stand submitted."

Sept. 24, 1970

Filed Court's Memorandum for Use in Preparation of Proposed Findings, Conclusions and Judgment.

Oct. 23, 1970

Lodged: Proposed Findings of Fact and Conclusions of Law. Lodged: Proposed Judgment.

Oct. 30, 1970

Filed Objections to Proposed Findings of Fact and Conclusions of Law and Request for Additional Findings.

Nov. 30, 1970

Filed Findings of Fact and Conclusions of Law. Filed Judgment and order thereon that the Burbank curfew ordinance is unconstitutional, illegal and void, that defendants are permanently enjoined and restrained from taking any action in pursuance of said ordinance and that plaintiffs and intervening plaintiff recover costs from defendants.

Dec. 22, 1970

Filed Defendants' Notice of Appeal. Filed Defendants' Bond for Costs on Appeal in the amount of \$250.

**United States Court of Appeals
for the Ninth Circuit**

Apr. 8, 1971

Filed Appellants' Brief.

June 18, 1971

Filed Attorney General's request for leave to file amicus curiae brief for the People of the State of California in support of appellant; with consent of appellants and appellees to file late amicus brief.

July 13, 1971

Filed Brief of the Federal Aviation Administration as Amicus Curiae.

July 14, 1971

Filed Appellees' Brief.

July 28, 1971

Filed Appellants' Reply Brief.

Nov. 3, 1971

Argued and submitted to (Br, D, T).

Mar. 22, 1972

Ordered opinion (Trask) filed and judgment to be filed and entered.

Mar. 22, 1972

Filed opinion—Affirmed.

Mar. 22, 1972

Filed and entered Judgment.

Apr. 13, 1972

Issued Judgment to Clerk, District Court.

May 15, 1972

Issued Amended Judgment to Clerk, District Court.

May 15, 1972

Received Appellants' Notice of Appeal to the Supreme Court.

Complaint for Declaratory Relief and Injunctive Relief.

1. **Burbank Municipal Code §20-32.1 Is Void, Illegal and Unconstitutional in Violation of the "Due Process" Clause of the U. S. Constitution.**
2. **Burbank Municipal Code §20-32.1 Is Void, Illegal and Unconstitutional in Violation of the "Commerce" Clause of the U. S. Constitution.**
3. **Burbank Municipal Code §20-32.1 Is Void, Illegal and Unconstitutional in Violation of the "Supremacy" Clause of the U. S. Constitution.**

United States District Court, Central District of California.

Lockheed Air Terminal Inc., a corporation and Pacific Southeast Air Lines, a corporation, Plaintiffs, vs. The City of Burbank, a municipal corporation; Dr. Jarvey Gilbert, Mayor; Robert R. McKenzie, Vice Mayor; Councilman George W. Haven; Councilman Robert A. Swanson; Councilman D. Verner Gibson; Joseph N. Baker, City Manager, Samuel Gorlick, City Attorney for the City of Burbank and Rex R. Andrews, Chief of Police of the City of Burbank, Defendants. No. 70-1075-EC.

Filed May 14, 1970

PLAINTIFF ALLEGES:

INTRODUCTION:

1. This is an action of a civil nature brought by **LOCKHEED AIR TERMINAL, INC.**, a Delaware corporation, and **PACIFIC SOUTHWEST AIR LINES**, a California corporation, for a declaratory judgment that Burbank Municipal Code §20-32.1, prohibiting pure jet aircraft from taking off from the Hollywood-Burbank Airport between the hours of 11:00 P.M. and 7:00 A.M. of the following day is invalid and uncon-

stitutional and for an order enjoining the enforcement of said ordinance.

JURISDICTION:

2. This action arises under the Constitution, Laws and Treaties of the United States as to which this Court has jurisdiction pursuant to Title 28 U.S.C., Section 1331 and under an Act of Congress regulating commerce as to which this Court has jurisdiction pursuant to Title 28 U.S.C., Section 1337, and this action presents for determination a case of actual controversy within the jurisdiction of this Court pursuant to Title 28 U.S.C., Section 2201 *et seq.* as more particularly appears hereinafter. The amount in controversy exceeds, exclusive of interest and costs, the sum and value of Ten Thousand (\$10,000) Dollars.

PARTY PLAINTIFFS:

3. (a) Plaintiff, LOCKHEED AIR TERMINAL INC., (hereinafter referred to as "Lockheed"), is a corporation organized and existing under and pursuant to the laws of the State of Delaware and is doing business in the County of Los Angeles, State of California. Lockheed, at all times material herein, was and is the owner and operator of the "Hollywood-Burbank Airport" (hereinafter referred to as "Airport").

(b) Plaintiff, PACIFIC SOUTHWEST AIR LINES (hereinafter referred to as "PSA"), is a corporation organized and existing under and pursuant to the laws of the State of California and is doing business in the County of Los Angeles, State of California.

PARTIES DEFENDANT:

4. (a) The City of Burbank is a municipal corporation in the County of Los Angeles, State

of California, having power to sue and be sued in its own name;

(b) DR. JARVEY GILBERT is the duly elected Mayor of the City of Burbank;

(c) ROBERT R. McKENZIE is the duly elected Vice Mayor of the City of Burbank;

(d) GEORGE W. HAVEN, ROBERT A. SWANSON and D. VERNER GIBSON are duly elected Councilmen for the City of Burbank;

(e) JOSEPH N. BAKER is the City Manager of the City of Burbank;

(f) SAMUEL GORLICK is the City Attorney of the City of Burbank;

(g) REX R. ANDREWS is the Chief of Police of the City of Burbank.

5. The defendants, GILBERT, McKENZIE, HAVEN, SWANSON and GIBSON, constitute the City Council for the City of Burbank and have the authority to enact and enforce ordinances for the regulation of specified matters within the City of Burbank. Defendant GORLICK and the attorneys within his office have the responsibility of prosecuting violations of ordinances and other misdemeanors within the City of Burbank. The defendant, REX R. ANDREWS, as Chief of Police, is responsible for and oversees the enforcement of municipal ordinances including the ordinance here in question.

STATEMENT OF CLAIM:

6. The Airport occupies approximately 550 acres in the northwestern portion of the City of Burbank. Although the major portion of the Airport is within the city limits of the City of Burbank, the Airport property is bounded by the City of Los Angeles to the north and

west. The Airport property is outlined in red on Exhibit A which is attached hereto and incorporated herein by reference as if set forth at length. The boundary between the City of Burbank and the City of Los Angeles is depicted in blue, on said Exhibit A, with the City of Burbank occupying that area depicted on Exhibit A, which lies to the south and east of the boundary.

7. The Airport is the largest privately owned airport in the United States, from the standpoint of commercial air carrier operations. As such, it is a vital link in interstate and intrastate air commerce. It figures prominently in the airport satellite complex plan of the Los Angeles metropolitan area and this importance is expected to increase.

8. The Airport was dedicated May 30, 1930, and has been in continuous use since by both private and commercial aircraft. On November 9, 1940, United Airlines Transport Corp. sold its wholly owned subsidiary, United Airports Company of California Limited, which Company was the owner and operator of the Airport, to Lockheed Aircraft Corporation, which subsequently changed the name of United Airports Company of California Limited to that of the plaintiff, Lockheed Air Terminal, Inc. After a public hearing, the Civil Aeronautics Board, on November 22, 1940, approved these transactions.

9. On March 31, 1970, the City Council of the City of Burbank enacted Ordinance No. 2216, which ordinance added Section 20-32.1 to the Burbank Municipal Code, the stated purpose of which is "to prohibit pure jet take-offs at the Hollywood-Burbank Airport between 11:00 P.M. and 7:00 A.M."

10. The newly enacted §20-32.1 of the Burbank Municipal Code, (hereinafter referred to as the "ordinance") provides as follows:

Aircraft Take-Offs:

(a) Pure Jets Prohibited from Taking Off Between 11:00 P.M. and 7:00 A.M.

It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

(b) Airport Operator Prohibited from Allowing Take-Offs.

It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

(c) Exception: Emergencies.

This section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off."

11. The ordinance, by its terms, became effective May 4, 1970. The penalty provided for the violation of said ordinance is a fine of not more than \$500.00 or six months in the county jail or both for each offense as set forth in Burbank Municipal Code §1-5.

12. The ordinance, by its terms, constitutes an absolute unconditioned and unqualified bar to routine jet take-off operations between the hours of 11:00 P.M. and 7:00 A.M. of the following day.

13. On information and belief, the defendant officials of the City of Burbank have publicly and re-

peatedly announced that they intend vigorously and aggressively to enforce the ordinance.

14. The ordinance does not limit itself to flights which overfly property within the City of Burbank, but purports to extend itself to take-offs from any runway, even those from which departing planes overfly the City of Los Angeles and not the City of Burbank.

15. The Airport has two principal runways for the operation of aircraft. These runways are designated by their compass heading in tens of degrees. Runway 25 has a compass heading of 250°. It handles aircraft which take off to the west. Departing aircraft using this runway do not fly over the City of Burbank. Runway 33 has a heading of 330° and aircraft departing by this runway do not fly over the City of Burbank. The location of these runways is such that their departure path is exclusively within the City of Los Angeles. Aircraft departing by runways 7 and 15 taking off to the east and south respectively do overfly the City of Burbank.

16. The Airport provides services to regularly scheduled commercial aircraft as well as privately owned, corporate and general aviation aircraft. In 1969, there were 32,984 air carrier movements from the Airport. This included 584,970 revenue passengers coming in and 593,311 revenue passengers departing from the Airport. Pure commercial jet aircraft operating from the Airport consist of Boeing 727's and 737's and Douglas DC9's. In 1969, there were 22,088 individual flight operations by these three types of aircraft. Of these jet operations at the Airport, the majority are by PSA, a regularly scheduled intrastate carrier. Regularly scheduled interstate jet flights are conducted by

Air West, Inc. to and from the Airport. The balance of the jet operations are by corporate and private aircraft as well as major scheduled airlines employing the Airport as an alternate to Los Angeles International Airport.

17. The Airport is designated by the FAA as an alternate to Los Angeles International Airport. Thus, when weather or other conditions at Los Angeles International are such that aircraft cannot be handled at that facility, they may be diverted to the Airport as an alternate. During the years 1967, 1968 and 1969, Los Angeles International Airport was closed for 469 hours and 21 minutes. During virtually that entire time, the Airport provided alternate services for regularly scheduled aircraft operating out of Los Angeles International Airport. In 1969, there were 34 alternate flights by Western Air Lines Inc., 103 alternate flights by United Air Lines and a substantial number of alternate flights by PSA and Air West, Inc., of aircraft diverted from Los Angeles International to the Airport. The availability of the Airport as an alternate to Los Angeles International Airport is fundamental to the safe operation of aircraft in and out of the greater Los Angeles Metropolitan Area. Much of this emergency back-up service is provided during the early morning hours when the fog conditions are at their worst at the Los Angeles International Airport. Enforcement of the ordinance would seriously restrict this much needed back-up safety feature of the Airport.

18. Lockheed Aircraft Corporation operates and maintains military defense plant facilities at the Airport and in connection therewith there were 3811 individual flight operations by military aircraft in 1969. A number of these operations were by pure jet aircraft operating in furtherance of the national defense. Because

of the substantial interests of the defense industry located at the Airport, many private pure jet flights operate from the Airport on military business. These flights must be free to operate at irregular hours to meet the many urgent demands of the military.

19. The United States has by §4 of the Federal Aviation Act of 1958 (49 U.S.C. §1304), declared a "public right of freedom, of transit through the navigable air space of the United States," and defined "navigable air space" to mean "air space above the minimum altitudes of flight prescribed by regulations issued under" such Act, and to "include air space needed to insure safety in take-off and landing of aircraft" (49 U.S.C. §1301(24)). Under such Act (49 U.S.C. §1341(a)), the Federal Aviation Administrator is "authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the . . . protection . . . of aircraft, for the protection of persons and property on the ground, . . . including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles . . ." (49 U.S.C. §1348(c)) and to "assign by rule, regulation, or order the use of the airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft" (49 U.S.C. §1348(a)).

20. Pursuant to his statutory authority, the Administrator has established regulations, procedures, standards and practices that cover every aspect of the operation of aircraft flying to, approaching, landing at and taking off from the Airport, including the operation of such aircraft over the surface of the land occupied by the City of Burbank. The Administrator has established Federal airways that pass over the Airport

and over the City of Burbank (Federal Aviation Regulations, §71.1 *et seq.*); and has established an airport traffic area and a control zone that includes all of the Airport and a substantial portion of the City of Burbank (Federal Aviation Regulations, §93.31 *et seq.*). This airport traffic area and this control zone extend from the surface of the land upwards (up to 2,000 feet above the surface in the case of the airport traffic area) within a five statute mile horizontal radius from the geographical center of the Airport (Federal Aviation Regulations, §93.31 *et seq.*). Attached hereto and incorporated herein by reference as Exhibit B, is an instrument approach plate for the Airport which depicts certain of these regulations. The ordinance, to the extent that it necessarily prevents operation of aircraft therein, is in direct conflict with the regulations establishing and governing the use of Federal airways, traffic areas and control zones.

21. The transportation by air in interstate and intrastate commerce of passengers, and property, is a highly complicated and technical operation. Considerations of safety and efficiency require that legislation as to each of the many aspects of such an operation should establish a single set of standards and procedures uniformly administered and sufficiently flexible and adaptable to respond to the dynamic nature of the operation and to the swift changes and technological developments to which it is susceptible. The Federal Aviation Act of 1958 (49 U.S.C. §1301 *et seq.*) and related legislation have established a comprehensive and exclusive statutory scheme for the regulation of air traffic and provided for the uniform and coordinated administration of the scheme by the Administrator.

22. The ordinance is invalid and unconstitutional for the following reasons:

(a) The ordinance is so unduly restrictive that the effect of the ordinance is to prohibit reasonable and normal activities ordinarily and necessarily carried on, in and about the City of Burbank to the degree that the ordinance violates and is repugnant to due process clause of Amendment XIV of the Constitution;

(b) It unreasonably bars scheduled aircraft flights to and from the Airport and is therefore repugnant to the due process clause of Amendment XIV of the Constitution;

(c) It is an unlawful interference with, and an unreasonable and undue burden upon, interstate commerce in violation of the Constitution (Art. I, Section 8, Clause 3);

(d) It is an undue interference with and burden upon the war power of the United States in violation of the Constitution (Art. I, Section 8, clauses 11-14);

(e) It is in conflict with the Federal Aviation Act of 1958 (49 U.S.C. §1301 *et seq.*) and other statutes of the United States and regulations issued thereunder, in violation of the Supremacy Clause of the Constitution (Art. VI, Section 2);

(f) Its provisions deal with a field that has been occupied and preempted by the Federal Government to a degree which excludes the enactment by public entities under their police powers, of ordinances such as the ordinance challenged herein.

23. Lockheed, in connection with its development and operation of the Airport, has entered into contracts which are now in effect with agencies of the Federal Government, air lines and miscellaneous tenants, permittees and other users of the Airport involving millions

of dollars. In addition, Lockheed is obligated to pay the City of Burbank substantial sums in the form of property tax payments covering the Airport property.

24. Compliance with the ordinance by the scheduled airlines and other operators using the Airport, would restrict operation of the Airport to such a degree as to substantially impair Lockheed's contractual rights, and goodwill, with the air lines, other lessees, permittees, concessionaires and users of the Airport. The Airport's reputation as one of the major air terminals in interstate and intrastate commerce would be destroyed. Compliance by PSA would restrict its ability to service and fulfill the public need for transportation and thereby impair its goodwill with the public. The extent of these damages could not be estimated or compensated for in money.

25. Surveys made of the public need for air transportation in the rapidly growing Los Angeles metropolitan area, predict greatly increased demands upon the existing air terminal facilities including the Airport. The unreasonable limitations on the use of the Airport by the enforcement of the ordinance inhibits Lockheed's ability to anticipate and meet these demands. There is nothing in the ordinance which prevents more restrictive modification of it in the future by future office holders of the City of Burbank and, therefore, the public is unable to plan on the extent of the services available from plaintiffs in the future. Neither are the plaintiffs able to chart and prepare for the Airport's future growth, all of which constitutes damage which cannot be estimated or compensated for in money.

26. By reason of the foregoing, the plaintiffs are immediately threatened with great and irreparable damage for which they have no adequate legal remedy.

WHEREFORE, the plaintiffs pray that the aforesaid ordinance and each and every part and section thereof be declared to be unconstitutional, illegal and void;

THAT the defendant, City of Burbank, and the individual defendants and each of them in their representative capacities as officials of the City of Burbank charged with the enforcement of the provisions of the aforesaid ordinance, their representatives, agents, servants, employees, attorneys and successors, be enjoined and restrained by a permanent Order of Injunction of this Court from taking any action in pursuance of said ordinance;

THAT pending determination of the prayer for an Order granting a permanent injunction, this Court issue a Preliminary Order of Injunction restraining the defendant, City of Burbank and the individual defendants and each of them individually and in their respective capacities as officials of the City of Burbank, charged with the enforcement of the provisions of the aforesaid ordinance, their representatives, agents, servants, employees, attorneys and successors from taking any action in pursuance of said ordinance.

THAT pending determination of the prayer for an Order granting Preliminary Injunction, this Court issue an Order temporarily restraining the City of Burbank and the individual defendants and each of them individually and in their respective capacities as officials of the City of Burbank, charged with the enforcement of the provisions of the aforesaid ordinance, their representatives, agents, servants, employees, at-

torneys and successors from taking any action in pursuance of said ordinance;

AND for such and other further relief as the Court may deem just and proper.

DATED: May 14th, 1970.

KIRTLAND & PACKARD

By: /s/ Winston F. Tyler

WINSTON F. TYLER

(Jurat omitted in printing).

**Answer to Complaint for Declaratory Relief
and Injunctive Relief.**

(Title omitted in printing).

Filed: June 4, 1970.

Come now Defendants THE CITY OF BURBANK, a municipal corporation; DR. JARVEY GILBERT, Mayor; ROBERT R. McKENZIE, Vice Mayor; Councilman GEORGE W. HAVEN; Councilman ROBERT A. SWANSON; Councilman D. VERNER GIBSON, JOSEPH N. BAKER, City Manager, SAMUEL GORLICK, City Attorney for the City of Burbank and REX R. ANDREWS, Chief of Police of the City of Burbank, and in answer to the Complaint for Declaratory Relief and Injunctive Relief deny, admit and allege as follows:

I

Answering Paragraph 7 of said Complaint, Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said Paragraph and placing their denial on that ground, deny each and every allegation and statement contained in said Paragraph 7.

II

Answering Paragraph 12 of said Complaint, Defendants deny each and every allegation and statement contained therein and in that connection allege as follows: That after said ordinance was adopted and prior to the time it became effective Plaintiff LOCKHEED AIR TERMINAL, INC. was invited to provide Defendant CITY OF BURBANK with a list of situations which it felt would qualify as emergencies under said ordinance and pursuant to such invitation a list was furnished by said plaintiff, a copy of which is attached

hereto as "Exhibit 1" and by this reference made a part hereof, and, after review by the City Attorney and officials of the Police Department of Defendant CITY of BURBANK, was approved and accepted for use by the Police Department in administering the emergency clause of said ordinance; that, in addition, at the request of Lockheed-California Company, a charter flight which departs Hollywood-Burbank Airport at 6:40 a.m. for Palmdale, Monday through Friday each week, to carry Lockheed-California specialists to Palmdale for critical work on the L-1011 program, was approved as an emergency flight under the provisions of said ordinance; that confirmation of such approval was made by letter dated May 1, 1970, a copy of which is attached hereto as "Exhibit 2" and by this reference made a part hereof; that the officials of the Defendant CITY OF BURBANK, have made every effort to be reasonable in the enforcement of said ordinance, and the only request refused was a request by Plaintiff PACIFIC SOUTHWEST AIR LINES that a regularly scheduled commercial flight on Sunday evenings, which departs at 11:30 p.m., be cleared as an emergency under the provisions of said ordinance.

III

Answering Paragraph 13 of said Complaint, Defendants deny each and every allegation and statement therein contained.

IV

Answering Paragraph 15 of said Complaint, Defendants admit all of the allegations and statements contained therein save and except the allegations that runways 25 and 33 are the principal runways utilized by aircraft departing the Hollywood-Burbank Airport

and in that connection allege that the principal runway utilized for such purposes is runway 15.

V

Answering Paragraph 16 of said Complaint, Defendants admit that said airport provides services to regularly scheduled commercial aircraft as well as privately owned corporate and general aviation aircraft and as to the remainder of the allegations contained in said Paragraph, Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of such allegations and placing their denial on that ground deny each and every allegation therein contained not herein specifically admitted to be true.

VI

Answering Paragraph 17 of said Complaint, Defendants deny that the availability of the airport as an alternate to Los Angeles International Airport is fundamental to the safe operation of aircraft in and out of the greater Los Angeles Metropolitan Area and further deny that the enforcement of the ordinance would seriously restrict this much needed back-up safety feature of the airport, and as to the remainder of the allegations contained in said Paragraph Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of such allegations, and placing their denial on that ground deny each and every such other allegation and statement therein contained.

VII

Answering Paragraph 18 of said Complaint, Defendants deny that these flights must be free to operate at irregular hours to meet the many urgent demands of the military or for other purposes and as to the remainder of the allegations contained in said Paragraph

Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of such allegations, and placing their denial on that ground deny each and every such other allegation and statement therein contained.

VIII

Answering Paragraph 20 of said Complaint, Defendants deny that said ordinance in any respect prevents operation of aircraft in the air space above and around said airport, and further deny that said ordinance in any respect directly conflicts with the regulations establishing and governing the use of Federal airways, traffic areas and control zones.

IX

Answering Paragraph 22 of said Complaint, Defendants deny each and every allegation and statement therein contained.

X

Answering Paragraph 23 of said Complaint, Defendants admit that Lockheed is obligated to pay the City of Burbank substantial sums in the form of property tax payments covering the airport property, and as to the remainder of the allegations contained in said Paragraph, Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of such allegations and placing their denial on that ground deny each and every allegation therein contained not herein specifically admitted to be true.

XI

Answering Paragraph 24 of said Complaint, Defendants deny each and every allegation and statement therein contained.

XII

Answering Paragraph 25 of said Complaint, Defendants admit that there is nothing in the ordinance or otherwise which prevents more restrictive modification of it in the future by future office holders of the City of Burbank; deny that the enforcement of the ordinance places unreasonable limitations on the use of the airport; deny that the ordinance inhibits Lockheed's ability to anticipate and meet future demands; deny that the public is unable to plan on the extent of the services available from Plaintiffs in the future; deny that the Plaintiffs are unable to chart and prepare for the airport's future growth; and deny that such alleged inability constitutes damage which cannot be estimated or compensated for in money.

XIII

Answering Paragraph 26 of said Complaint, Defendants deny each and every allegation and statement therein contained.

WHEREFORE, Defendants pray that Plaintiffs take nothing by their Complaint and that they be hence dismissed with their costs.

DATED this 3rd day of June, 1970.

SAMUEL GORLICK, City Attorney,
and RICHARD L. SIEG, JR.,
Asst. City Atty.

By /s/ Richard L. Sieg, Jr.

Richard L. Sieg, Jr.

Attorneys for all defendants except
Samuel Gorlick

/s/ Richard L. Sieg, Jr.

Richard L. Sieg, Jr., Attorney
for defendant Samuel Gorlick

EXHIBIT 1

EMERGENCY CONDITIONS JUSTIFYING
A JET DEPARTURE DURING CURFEW
HOURS

1. Delay of a flight which had been scheduled for departure prior to 2300 due to:

Mechanical problems

Weather

Air traffic control procedures

In these instances with the potential of many passengers being affected, we would have the range of emergency trips, disruption of vacation and business arrangements as well as the economic hardship for the passengers and the airlines.

2. Departure delayed due to bomb threat—aircraft delayed for search of aircraft, passengers and baggage.
3. Weather conditions causing aircraft to land here in place of a previously planned airport. When the weather permits, the aircraft should be allowed to resume its flight to avoid further disruption of the airlines' aircraft scheduling.
4. Medical emergency flights such as flying serum or other medical supplies and ambulance flights.
5. Military flights were the pilot states that an emergency exists.
6. Flights transporting personnel to work on government projects. If, due to the curfew, these people would be unable to get to their destination when needed, then the delay would not be in the national interest.



FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

7. An aircraft which had to land here because of emergency conditions such as the illness of a passenger or a mechanical condition of the aircraft, should be allowed to depart as soon as the emergency condition is rectified.
8. In the interests of national security, corporate jets are sometimes required to depart during what would be curfew hours to enable officials to attend critical meetings with regard to government contracts.
9. The departure of an aircraft used in fighting fires or to transport personnel to fight a fire.

EXHIBIT 2.

Office of City Attorney
CITY OF BURBANK
California

275 East Olive Ave.

Tel: 846-2141

849-1231

May 1, 1970

Mr. David M. Simmons
President

Lockheed Air Terminal
2627 North Hollywood Way
Burbank, California 91502

Dear Dave:

The list of emergency conditions justifying a jet departure during curfew hours furnished by your office appears reasonable and will be used by the Police Department at least for the time being. In addition, the 6:40 A.M. charter flight by Lockheed-California spe-

cialists to Palmdale each working day has been cleared as an emergency flight.

If there are any modifications, you will be notified.

Very truly yours,

SAMUEL GORLICK

City Attorney

SG:lh

cc: City Manager

Chief of Police

(Affidavit of Service omitted in printing).

EXHIBIT I

Office of City Attorney
CITY OF BURBANK

California

375 East Olive Ave.

Tel: 846-2141

846-1231

May 1, 1970

Mr. David M. Simmons

President

Lockheed A. Terminal

2627 North Hollywood Way

Burbank, California 91503

Dear David:

The list of emergency conditions following a fire in
particular during coffee hours furnished by your office
appears reasonable and will be used by the Police De-
partment at least for the time being. In addition, the
8:40 A.M. charter flight by Lockheed-California spe-

Complaint of Intervening Plaintiff Air Transport Association of America.

(Title omitted in printing).

Filed: July 8, 1970.

Intervening plaintiff AIR TRANSPORT ASSOCIATION OF AMERICA alleges as follows:

1. Paragraphs 1 through 21, inclusive, and 23 through 26, inclusive, of plaintiff's complaint are adopted and incorporated herein by reference:

2. Air Transport Association of America ("ATA") is an unincorporated trade association, the members of which include virtually all United States scheduled air carriers. Among its 32 members are the following scheduled air carriers which use Hollywood-Burbank Airport:

(a) Air West, Inc., which conducts regularly scheduled interstate jet flights to and from Hollywood-Burbank Airport under authority of a certificate of public convenience and necessity issued by the Civil Aeronautics Board;

(b) Continental Air Lines, which plans to commence regularly scheduled interstate jet flights to and from Hollywood-Burbank Airport on or about August 29, 1970, under authority of a certificate of public convenience and necessity issued by the Civil Aeronautics Board;

(c) United Air Lines, Inc., which uses and has used Hollywood-Burbank Airport as an alternate in the event that whether or other conditions prevent landing at Los Angeles International Airport;

(d) Western Air Lines, Inc., which has used and uses Hollywood-Burbank Airport as an alternate in the event that weather or other condi-

tions prevent operations at Los Angeles International Airport.

3. The Federal Aviation Act of 1958, 72 Stat. 737 (1958), as amended, 49 U.S.C. § 1301, *et seq.* (1964), provides, among things, as follows with reference to navigable airspace and air commerce:

(a) By § 104 of said Act, there is "recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States," said "navigable airspace" being defined by § 101(24) of the Act to mean "airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in take-off and landing of aircraft."

(b) By § 611 of said Act, added by Public Law 90-411, 82 Stat. 395 (1968), the Administrator of the Federal Aviation Administration is required to prescribe and amend such standards, rules and regulations as he may find necessary for the control and abatement of aircraft noise. In prescribing and amending such standards, rules and regulations the Administrator is required, among other things, to consider whether any proposed standard, rule or regulation is consistent with the highest degree of safety in air commerce and whether it is economically reasonable, and technologically practicable and appropriate for the particular type of aircraft or aircraft engine to which it will apply.

(c) Under §§ 102(a) (b) and (e) of said Act, the Civil Aeronautics Board is required to consider "as being in the public interest and, in

accordance with the public convenience and necessity," among other things, (i) the "encouragement and development of the air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense," (ii) the "regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers," and (iii) the "promotion of safety in air commerce."

(d) Under §§ 103(c) and (e) of said Act and under § 6(c)(1) of the Department of Transportation Act, 80 Stat. 931 (1966), 49 U.S.C.A. § 1655(c)(1) (1966), the Administrator of the Federal Aviation Administration is required to consider, "as being in the public interest," among other things, the "control of the use of navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both" and the "development and operation of a common system of air traffic control and navigation for both military and civil aircraft."

(e) Under § 307(a) of said Act and under § 6(c)(1) of the Department of Transportation Act, 80 Stat. 931 (1966), 49 U.S.C.A. § 1655(c)(1) (1966), the Administrator of the Federal Aviation Administration is "authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign

by rule, regulation, or order the use of the navigable airspace under such terms, conditions and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace."

(f) Under § 307(c) of said Act and under § 6(c)(1) of the Department of Transportation Act, 80 Stat. 931 (1966), 49 U.S.C.A. § 1655(c)(1) (1966), the Administrator of the Federal Aviation Administration is "authorized and directed to prescribe the air traffic rules and regulations governing the flight of aircraft, for the navigation, protection and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects."

(g) Under §§ 602, 603 and 604 of said Act and under § 6(c)(1) of the Department of Transportation Act, 80 Stat. 931 (1966), 49 U.S.C.A. § 1655(c)(1) (1966), the Administrator of the Federal Aviation Administration is authorized to issue air carrier operating certificates, airman certificates, and aircraft certificates, including airworthiness certificates.

(h) Under § 308 of said Act and under § 6(c)(1) of the Department of Transportation Act, 80 Stat. 931 (1966), 49 U.S.C.A. § 1655(c)(1) (1966), the Administrator of the Federal Aviation Administration is authorized to recommend and certify that a landing area or facility is rea-

sonably necessary for use in air commerce or in the interests of national defense.

(i) Under § 312(b) of said Act and under § 6(c)(1) of the Department of Transportation Act, 80 Stat. 931 (1966), 49 U.S.C.A. § 1655-(c)(1) (1966), the Administrator of the Federal Aviation Administration is "empowered to undertake or supervise such developmental work and service testing as tends to the creation of improved aircraft, aircraft engines, propellers, and appliances."

(j) Under § 401 of said Act, the Civil Aeronautics Board is authorized to issue certificates of public convenience and necessity with respect to airline routes and services.

(k) Once a certificate is granted to an airline, §§ 404(a) and (j) of said Act require the airline to render "safe and adequate service" and prohibit its abandoning "any route or part thereof" without the permission of the Civil Aeronautics Board.

(l) By virtue of §§ 401(1) and 405(a) of said Act, airlines are under a federal obligation to transport mail when so authorized by their certificates, and the Postmaster General is authorized to make necessary regulations for the safe and expeditious carriage of mail by aircraft.

4. The Administrator of the Federal Aviation Administration has issued certificates, promulgated extensive rules and regulations, made recommendations, and undertaken developmental work on aircraft as authorized by the Federal Aviation Act. On September 27, 1961, the Administrator issued an amendment to 14

C.F.R. § 60.18 (now 14 C.F.R. § 91.87), which is applicable to all traffic in the vicinity of airports with control towers and which has the purpose, among others, of aiding in the "abatement of aircraft noise as it affects adjacent communities." 26 Fed. Reg. 9069. The Postmaster General has issued regulations regarding carriage of mail by aircraft as authorized by the Act. The Civil Aeronautics Board has issued certificates of public convenience and necessity, as authorized by the Act.

5. Each of the members of ATA which conduct scheduled operations to and from Hollywood-Burbank Airport do so under authority of a certificate of public convenience and necessity issued by the Civil Aeronautics Board. Each of the members of ATA which use Hollywood-Burbank Airport is a holder of an air carrier operating certificate issued by the Administrator of Civil Aeronautics (now Administrator of the Federal Aviation Administration) specifying each is "properly and adequately equipped and able to conduct a safe operation as an air carrier of persons, property, and mail in scheduled air transportation." Every aircraft operated by these carriers holds an airworthiness certificate from the Administrator of the Federal Aviation Administration approving its use on certificated operations. Every pilot operating said aircraft holds a valid and effective airman's certificate issued by the Federal Aviation Administration. These carriers are authorized and required to transport mail by their certificates of public convenience and necessity.

6. Pursuant to §51(b) of the Airport and Airway Development Act of 1970, Public Law 91-256,

Stat. (May 21, 1970) and as a part of the national plan to develop airports and airways adequate to meet present and future needs, the Administrator of the FAA is authorized to issue airport operating certificates to airports serving air carriers certificated by the CAB. Airports to which this provision is applicable (such as Hollywood-Burbank Airport) are required to obtain such certificate within two years.

7. The federal government (through the Federal Aviation Act of 1958 and the Federal Airport Act, and through the orders and regulations of the Civil Aeronautics Board, the Federal Aviation Administration, and the Postmaster General) has preempted the fields of the control and regulation of the use of the navigable airspace and the control and regulation of aircraft operations by any and all means. Therefore, the ordinance of the City of Burbank which prohibits the takeoff of jet aircraft between 11:00 P.M. and 7:00 A.M. ("curfew ordinance"), thereby restricting the use of navigable airspace and outlawing certain aircraft operations, is invalid and void as applied to the scheduled air carrier members of ATA and others.

8. All flights of aircraft operated by the scheduled air carrier members of ATA into and out of Hollywood-Burbank Airport are within the navigable airspace as defined in Section 101(24) of the Federal Aviation Act of 1958, 72 Stat. 737 (1958), 49 U.S.C. § 1301(24) (1964), and are conducted in accordance with the federal rules and regulations promulgated pursuant to said Act. Restriction and limitation of these flights by the curfew ordinance of the City of Burbank would be contrary to the public right of free transit through the navigable airspace, would be in direct and open conflict with federal statutes and federal regula-

tions, would disrupt passenger and freight service now conducted pursuant to federal certification, would impede the use of aircraft designed and constructed according to the best and latest technological advances and approved and certificated by the United States, would interfere with the orderly operation of the postal establishment, and would result in irreparable injury and damage to the business and property of these air carrier members of ATA. Accordingly, said curfew ordinance is invalid and void because of the supremacy of federal laws and regulations as declared in Article VI, Clause 2, of the Constitution of the United States.

6. Enforcement of said curfew ordinance of the City of Burbank would unduly and unreasonably burden, hinder, and restrain interstate commerce in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, and therefore said ordinance is invalid and void as applied to the air carrier members of ATA and others.

WHEREFORE, this intervening plaintiff prays:

1. That the curfew ordinance and each and every part and section thereof be declared to be unconstitutional, illegal and void;
2. That the defendant City of Burbank and the individual defendants and each of them in their respective capacities as officials of the City of Burbank charged with the enforcement of the provisions of the aforesaid ordinance, their representatives, agents, servants, employees, attorneys and successors be enjoined and restrained by a permanent order of injunction of this Court from taking any action in pursuance of said ordinance; and

3. For such further and other relief as the Court may deem just and proper.

DATED: July 8, 1970.

**O'MELVENY & MYERS
WARREN CHRISTOPHER
HENRY C. THUMANN
RALPH W. DAU**

**By /s/ Warren Christopher
Warren Christopher**

**Attorneys for Intervening Plaintiff
Air Transport Association of America**

(Affidavit of Service omitted in printing).

**Answer to Complaint of Intervening Plaintiff
Air Transport Association of America**

(Title omitted in printing).

Filed: July 22, 1970.

Come now Defendants **THE CITY OF BURBANK**, a municipal corporation; **DR. JARVEY GILBERT**, Mayor; **ROBERT R. MCKENZIE**, Vice Mayor; Councilman **GEORGE W. HAVEN**; Councilman **ROBERT A. SWANSON**; Councilman **D. VERNER GIBSON**, **JOSEPH N. BAKER**, City Manager, **SAMUEL GORLICK**, City Attorney for the City of Burbank and **REX R. ANDREWS**, Chief of Police of the City of Burbank, and in answer to the Complaint of Intervening Plaintiff **AIR TRANSPORT ASSOCIATION OF AMERICA**, deny, admit and allege as follows:

I.

In answer to paragraph 1 of said Complaint, Defendants adopt and incorporate herein by reference Paragraphs I, II, III, IV, V, VI, VII, VIII, X, XI, XII and XIII of their Answer to the Complaint of Plaintiffs **LOCKHEED AIR TERMINAL, INC.** and **PACIFIC SOUTHWEST AIR LINES** on file herein.

II.

Answering Paragraph 2 of said Complaint, Defendants admit that Plaintiff **AIR TRANSPORT ASSOCIATION OF AMERICA** ("ATA") is an unincorporated trade association, the members of which include scheduled air carriers using the Hollywood-Burbank Airport; that Air West, Inc., conducts regularly scheduled interstate jet flights between Hollywood-Burbank Airport and Las Vegas, Nevada, and that United Air Lines, Inc. and Western Air Lines, Inc. have used the Hollywood-Burbank Airport when weather conditions prevented landing at Los Angeles International Airport;

and as to the remainder of the allegations contained in said Paragraph, Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of such allegations and placing their denial on that ground, deny each and every allegation therein contained not herein specifically admitted to be true.

III.

Answering Paragraph 5 of said Complaint, Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said Paragraph and placing their denial on that ground, deny each and every allegation and statement contained in said Paragraph 5.

IV.

Answering Paragraph 6 of said Complaint, Defendants admit and allege that by the Airport and Airway Development Act of 1970, Public Law 91-258, 84 Stat. 219 (May 21, 1970), the Secretary of Transportation, among other things, was directed to prepare and publish a national airport system plan for the development of public airports in the United States owned and controlled by public agencies and to make grants therefor if, among other things, appropriate action has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft; that said Act further declares it to be the national policy that airport development projects authorize pursuant to said Act shall provide for the protection and enhancement of the natural resources and the quality of environment of the nation; that Section 51(b) of said Act authorizes the Administrator of the Federal

Aviation Administration to issue airport operating certificates to airports serving air carriers certified by the Civil Aeronautics Board and to establish minimum safety standards for the operation of such airports and that before an airport operating certificate may be issued the Administrator must find, after investigation, that the airport is properly and adequately equipped and able to conduct a safe operation in accordance with the requirements of the Federal Aviation Act of 1958, as amended, and the rules, regulations and standards prescribed thereunder; and that airports, including the Hollywood-Burbank Airport, if they wish to continue to serve air carriers certificated by the Civil Aeronautics Board, must obtain such a certificate within two years after May 21, 1970; and further answering said Paragraph deny each and every allegation and statement therein contained not herein specifically admitted to be true.

V.

Answering Paragraph 7 of said Complaint, Defendants deny each and every allegation and statement therein contained.

VI

Answering Paragraph 8 of said Complaint, Defendants admit that all flights of aircraft operated by scheduled air carriers into and out of Hollywood-Burbank Airport are required to be conducted in accordance with the Federal rules and regulations promulgated pursuant to the Federal Aviation Act of 1958, as amended, and further answering said Paragraph deny each and every allegation and statement therein contained not herein specifically admitted to be true.

VII

Answering Paragraph 9 appearing on page 9 of said Complaint (erroneously numbered Paragraph 6), Defendants deny each and every allegation and statement therein contained.

WHEREFORE, Defendants pray that intervening plaintiff AIR TRANSPORT ASSOCIATION OF AMERICA take nothing, by its Complaint and that they be hence dismissed with their costs.

DATED this 21st day of July, 1970.

SAMUEL GORLICK, City Attorney,
and RICHARD L. SIEG, JR.,

Asst. City Atty.

By /s/ Richard L. Sieg, Jr.

Richard L. Sieg, Jr.

Attorneys for all defendants except

Samuel Gorlick

/s/ Richard L. Sieg, Jr.

Richard L. Sieg, Jr., Attorney

for defendant Samuel Gorlick

(Affidavit of Service omitted in printing).

Pretrial Conference Order.

(Title omitted in printing).

Lodged July 22, 1970.

Filed: July 27, 1970.

Following pretrial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court;

IT IS ORDERED:

I. A. *Nature of action.*

This is an action for declaratory relief and injunction seeking to invalidate an ordinance of the City of Burbank which prohibits jet aircraft from taking off from the Hollywood-Burbank Airport between the hours of 11:00 P.M. and 7:00 A.M.

B. *Parties.*

1. *Plaintiffs:* Lockheed Air Terminal, Inc., a corporation, and Pacific Southwest Airlines ("PSA") a corporation.

2. *Intervening Plaintiff:* Air Transport Association of America ("ATA"), an unincorporated trade association.

3. *Defendants:* The City of Burbank, a municipal corporation; Dr. Jarvey Gilbert, Mayor; Robert R. McKenzie, Vice Mayor; George W. Haven, Councilman; Robert A. Swanson, Councilman; D. Verner Gibson, Councilman; Joseph N. Baker, City Manager; Samuel Gorlick, City Attorney; Rex R. Andrews, Chief of Police.

C. *The pleadings which raise the issues are:*

1. Complaint for Declaratory Relief and Injunctive Relief, filed May 14, 1970;

2. Answer to Complaint for Declaratory Relief and Injunctive Relief, Filed June 4, 1970;

3. Complaint of Intervening Plaintiff Air Transport Association of America, filed July 8, 1970;

4. Answer to Complaint of Intervening Plaintiff, to be filed by the City of Burbank.

II. Federal jurisdiction and venue are invoked upon the grounds:

A. Federal question and amount in controversy (28 U.S.C. § 1331 (a)).

This action arises under the Federal Aviation Act of 1958, 72 Stat. 737 (1958), as amended, 49 U.S.C.A. §§ 1301-1542; the Department of Transportation Act, 80 Stat. 931 (1966), 49 U.S.C. §§ 1651-1659 (Supp. IV 1969); The Airport and Airway Development Act of 1970, Public Law 91-258, Stat. (May 21, 1970); the Constitution of the United States, Article 5, Section 8, Clause 3 (the Commerce Clause), and Article III, Section 2 (the Supremacy Clause). The matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs.

B. Commerce regulations (28 U.S.C. § 1337).

This action arises under those Acts of Congress regulating commerce, cited in section II. A, *supra*.

C. All defendants reside in, and the claim arose in, this Judicial District.

III. The following facts are admitted and require no proof:

1. Plaintiff Lockheed Air Terminal, Inc. (hereinafter "Lockheed"), is a corporation organized and

existing under and pursuant to the laws of the State of Delaware and is doing business in the County of Los Angeles, State of California. Lockheed, at all times material herein, was and is the owner and operator of the Hollywood-Burbank Airport.

2. Plaintiff Pacific Southwest Airlines (hereinafter "PSA") is a corporation organized and existing under and pursuant to the laws of the State of California and is doing business in the County of Los Angeles, State of California.

3. Intervening plaintiff Air Transport Association of America (hereinafter "ATA") is an unincorporated trade association, the members of which include virtually all United States scheduled interstate air carriers. Among its 32 members are the following scheduled air carriers which use Hollywood-Burbank Airport: Air West, Inc.; United Air Lines, Inc.; Western Air Lines, Inc. Among its other members is Continental Air Lines, Inc., which obtained authority pursuant to Civil Aeronautics Board Order No. 70-5-52, issued May 12, 1970, "to engage in air transportation with respect to persons, property, and mail . . . between the terminal point Seattle-Tacoma, Wash., the intermediate points Portland, Oreg., and San Francisco-Oakland-San Jose, Calif. (to be served through the Metropolitan Oakland International Airport and the San Jose Municipal Airport), and the terminal point Los Angeles-Ontario-Long Beach-Hollywood-Burbank-Santa Ana-Orange County, Calif. (to be served through the Ontario International Airport, the Long Beach Municipal Airport, the Hollywood-Burbank Airport, and the Orange County Airport)."

4. The City of Burbank is a municipal corporation in the County of Los Angeles, State of California, having power to sue and be sued in its own name;

Dr. Jarvey Gilbert is the duly elected Mayor of the City of Burbank;

Robert R. McKenzie is the duly elected Vice Mayor of the City of Burbank;

George W. Haven, Robert A. Swanson and D. Verner Gibson are duly elected Councilmen for the City of Burbank;

Joseph N. Baker is the City Manager of the City of Burbank;

Samuel Gorlick is the City Attorney for the City of Burbank;

Rex R. Andrews is the Chief of Police of the City of Burbank.

5. The defendants, Gilbert, McKenzie, Haven, Swanson and Gibson, constitute the City Council for the City of Burbank and have the authority to enact and enforce ordinances for the regulation of specified matters within the City of Burbank. Defendant Gorlick and the attorneys within his office have the responsibility of prosecuting violations of ordinances and other misdemeanors within the City of Burbank. The defendant, Rex R. Andrews, as Chief of Police, is responsible for and oversees the enforcement of municipal ordinances including the ordinance here in question.

6. Hollywood-Burbank Airport was dedicated May 30, 1930 and has been in continuous use since that time by both private and commercial aircraft. The Airport provides services to regularly scheduled commercial aircraft as well as to privately owned corporate and general aviation aircraft. Hollywood-Burbank Airport

occupies approximately 535 acres, approximately 128 of which are owned by the United States Government. The Airport lies mainly in the City of Burbank and partially in the City of Los Angeles.

7. The City of Burbank has a population of approximately 95,000.

8. On March 31, 1970 the City Council of the City of Burbank duly and regularly adopted Ordinance No. 2216, which added Section 20-32.1 to the Burbank Municipal Code providing as follows:

"Sec. 20-32.1 Aircraft Take-Offs.

"(a) Pure Jets Prohibited from Taking Off Between 11:00 P.M. and 7:00 A.M.

"It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(b) Airport Operator Prohibited from Allowing Take-Offs.

"It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(c) Exception: Emergencies.

"This section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off."

and said ordinance became effective on May 4, 1970. The stated purpose of the ordinance is "to prohibit pure jet take-offs at the Hollywood-Burbank Airport between 11:00 P.M. and 7:00 A.M."

9. The defendant officials of the City of Burbank have publicly announced their intention to enforce the curfew ordinance.

10. As a result of the process of industrialization and urbanization, almost one out of every twenty people in the United States lives in the Los Angeles five-county area.

11. Hollywood-Burbank Airport is the most convenient airport for the entire San Fernando Valley, Hollywood, and the cities of Burbank, Glendale, Pasadena, and Alhambra, an area containing a population of over 2.2 million persons.

12. Hollywood-Burbank Airport has two principal runways for the operation of aircraft. These runways are designated by their compass heading in tens of degrees.

(a) The "north-south" runway is situated on an axis of 330° - 150° . This runway is designated Runway 33 when it is used by aircraft taking off to the northwest or landing from the southeast, and, Runway 15 when it is used by aircraft landing from the northwest or taking off to the southeast. Approximately 2,050 feet of the northernmost portion of this runway lie in the City of Los Angeles on land owned by the United States Government.

(b) The "east-west" runway is situated on an axis of 070° - 250° . This runway is designated Runway 7 when it is used by aircraft landing from the west or taking off to the east, and, Runway 25 when it is used by aircraft landing from the east or taking off to the west. Approximately 2,250 feet of the westernmost portion of this runway lie on land owned by the United States Government.

(c) Aircraft landing on Runways 7 and 15 and aircraft departing on Runways 25 and 33 do not overfly the City of Burbank.

13. The following types of pure jet commercial aircraft operate from the Hollywood-Burbank Airport: Boeing 727, Boeing 737, Douglas DC-9. The following types of pure jet business aircraft operate from the Airport: Jetstar, Gulfstream II, Sabreliner, Lear Jet, DeHavilland and Falcon.

14. Each scheduled interstate air carrier that uses Hollywood-Burbank Airport holds a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board which provides as set forth in said Certificate.

15. PSA holds a Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission which provides as set forth in said Certificate.

16. Each scheduled interstate air carrier that uses Hollywood-Burbank Airport holds an Air Carrier Operating Certificate issued by the Administrator of the FAA, which provides as set forth in said Certificate.

17. PSA holds a Commercial Operating Certificate issued by the Administrator of the FAA, which provides as set forth in said Certificate.

18. The Administrator of the FAA has issued Operations Specifications to each regularly scheduled air carrier that uses Hollywood-Burbank Airport, which Operations Specifications provide as set forth therein.

19. Air West operates Douglas DC-9 aircraft at Hollywood-Burbank Airport. United has operated and operates the following types of aircraft at Hollywood-

Burbank Airport: Boeing 727 and Boeing 737. Western operates and has operated Boeing 737 aircraft at Hollywood-Burbank Airport. PSA operates the following types of aircraft at Hollywood-Burbank Airport: Boeing 727, Boeing 737 and Douglas DC-9.

20. Each pilot of a civil aircraft of United States registry operated in the navigable airspace of the United States is required to have in his personal possession a current pilot certificate issued by the Administrator of the FAA (FAR 61.3(a)). Each pilot of an aircraft operated by a scheduled air carrier at Hollywood-Burbank Airport is required to hold a current air transport pilot certificate issued by the Administrator (FAR 61.161). Each flight engineer of a civil aircraft of United States registry is required to have in his personal possession a current flight engineer's certificate issued by the Administrator (FAR 63.3(b)).

21. Pursuant to newly enacted federal legislation, Hollywood-Burbank Airport is required to apply for an Airport Operating Certificate issued by the Administrator of the FAA pursuant to Section 51(b) of the Airport and Airway Development Act of 1970, Public Law 91-258, Stat. (May 21, 1970), within two years from the date of enactment.

22. The FAA operates the Airport Traffic Control Tower and Radar Approach and Departure Control at Hollywood-Burbank Airport. In connection with such operation the FAA has expended approximately \$2 million on the installation of navigational aids at Hollywood-Burbank Airport, including the Instrument Landing System ("ILS"), runway and identification lights, and radar and radio equipment.

23. Pursuant to the Federal Aviation Act of 1958, 49 U.S.C. §1301, *et seq.*, the Administrator of the FAA has determined that there exists a need for a system that will provide adequate separation between and orderly control of the air traffic emanating from points within and without the United States and converging on large metropolitan areas and airports, such as Hollywood-Burbank Airport. Accordingly, the Administrator has established a system for the control of air traffic which provides for such separation, and which operates within controlled airspace identified as "control zones" and "control areas." Control zones encompass all the airspace from the surface to infinity within five miles of the geographical center of an airport. Control areas are of varying elevations and dimensions, and include the area surrounding Hollywood-Burbank Airport. The airspace within a control zone below an altitude within 2,000 feet above the surface is defined as the airport traffic area (FAR 1.1). Hollywood-Burbank Airport is located under a control area, within an airport traffic area, within a control zone and under many converging Federal airways, all of which have been established by the Administrator of the FAA pursuant to statutory authority. Unless otherwise authorized by FAA Air Traffic Control, a pilot operating within an airport traffic area must maintain two-way radio communication with the control tower (FAR 91.87(b)). He is further required to comply with all clearances and instructions that may be issued by Air Traffic Control (FAR 91.75(b)). Air Traffic Control over the aircraft within the Hollywood-Burbank Airport Control Zone including approach control and departure control, is exercised by FAA personnel located in the control tower situated at the airport. Except when in direct

communication with the control tower, each regularly scheduled air carrier is required by its Operations Specifications to operate its jet aircraft in accordance with FAA Instrument Flight Rules ("IFR"). When not under the control of an FAA airport control tower, aircraft operating under IFR are under the direct control of an FAA Air Route Traffic Control Center and are required to comply with the clearances received from that facility. (FAR 91.115; 91.75(a)).

24. Prior to the commencement of operations involving jet aircraft landings and take-offs on the two runways at Hollywood-Burbank Airport, a determination was made by the FAA that such use of each runway would not be unsafe either to persons or property on the ground or to persons and property in the air.

25. No aircraft may taxi at or take off from Hollywood-Burbank Airport without first receiving an appropriate clearance from Air Traffic Control (FAR 91.87(h)). When a commercial jet aircraft is ready for departure from its terminal gate, it makes radio contact with Air Traffic Control. It is at that time assigned a runway for take-off and is ultimately given clearance to taxi thereto. Prior to taking its position on the runway, the aircraft is given departure clearance, which includes the assignment of departure procedures and assignment of a radio beam intersection to which the aircraft is directed to fly. On receiving its clearance to take off, each jet or other large aircraft is required to conform with all FAA take-off procedures and to climb to an altitude of 1,500 feet above the airport surface as rapidly as practicable. (FAR 91.87(f)) Departure clearances for IFR aircraft incorporate standard instrument departure procedures established for Hollywood-Burbank Airport by the FAA.

Pictorial charts showing these standard instrument departure procedures are published by the Department of Commerce, United States Coast and Geodetic Survey. Aircraft taking off from Hollywood-Burbank Airport must conform with the assigned FAA departure clearance including all standard IFR departure procedures incorporated therein (FAR 91.75(a), 91.116). Upon reaching an altitude and position clear of other traffic, control of the aircraft is passed from Hollywood-Burbank Departure Control to the FAA Air Route Control Center located at Palmdale, California.

26. On entering and operating within the Hollywood-Burbank Airport Traffic Area, jets and other large aircraft must be operated at an altitude of at least 1,500 feet except when further descent is required for a safe landing. (FAR 91.87(d)(2)) No aircraft may be landed at Hollywood-Burbank Airport without first receiving an Air Traffic Control clearance (FAR 91.87(h)). In addition to exercising approach control, the FAA maintains and operates an Instrument Landing System ("ILS") which electronically establishes a three-degree glide slope to Runway 7 at Hollywood-Burbank Airport. Each of the aircraft operated by the regularly scheduled air carriers is equipped with electronic devices that monitor the ILS glide slope and depict the glide slope position in relation to that of the aircraft on the cockpit instrument. On receiving FAA clearance to approach for landing, the aircraft is required to be at or above the glide slope at the outer ILS marker and to remain at or above the glide slope until reaching the middle ILS marker. (FAR 91.87(d)(2)) The outer marker is lo-

cated approximately 6.1 nautical miles from the approach end of Runway 7, while the middle marker is located approximately 1.8 nautical miles from the approach end of the runway. The glide slope altitude at the outer ILS marker is approximately 2,000 feet above the surface and at the middle marker is approximately 575 feet above the surface. As an additional means of approach control, the FAA prescribes standard instrument approach procedures which are published in Part 97 of the Federal Aviation Regulations. Pictorial approach and landing charts showing these standard instrument approach procedures are published by the Department of Commerce, United States Coast and Geodetic Survey. Approaches to Hollywood-Burbank Airport conducted under instrument flight rules are required to be in accordance with the standard instrument approach procedures set forth in Part 97 of the Federal Aviation Regulations (FAR 91.116).

27. In the interest of alleviating noise disturbances to the residents of communities adjoining airports located in metropolitan areas, the Administrator of the FAA has established regulations that (1) require turbine powered fixed wing aircraft, approaching for landing, to maintain within the airport traffic area an altitude of at least 1,500 feet above the surface of the airport "until further descent is required for a safe landing," and (2) require such aircraft, when taking off, to climb to 1,500 feet as rapidly as practicable (FAR 91.87(d), (f)).

28. From February 1968 until July 12, 1970, PSA operated a Boeing 727 aircraft which departed the Hollywood-Burbank Airport at 11:30 P.M. each Sunday night destined for San Diego. This was the

only regularly scheduled flight taking off from Hollywood-Burbank Airport between the hours of 11:00 P.M. and 7:00 A.M. This was an intrastate flight originating in Oakland, California with its final destination San Diego, California.

29. Since March 9, 1970 PSA has operated a Boeing 727 or Boeing 737 aircraft on charter to Lockheed California Company which aircraft departs from the Hollywood-Burbank Airport Monday through Friday at 6:40 A.M. destined for Palmdale. This flight is being permitted to operate by the City as an emergency flight.

30. Several fleets of corporate jet aircraft use Hollywood-Burbank Airport as their home base. Prior to the enactment of the curfew ordinance, there were at least three flights per week of corporate jet aircraft during the now-proscribed curfew period.

31. Lockheed Aircraft Corporation operates and maintains military defense plant facilities at Hollywood-Burbank Airport.

IV. The reservations as to the facts recited in paragraph III above are as follows:

Defendants reserve objections on the ground of materiality to the facts admitted in sub-paragraphs 14-27, inclusive, of paragraph III, *supra*.

V. The following facts, though not admitted, are not to be contested at the trial by evidence to the contrary:

1. Hollywood-Burbank Airport is the largest privately owned airport in the United States, from the standpoint of commercial air carrier operations.

2. In 1969 there were 32,984 flight operations to and from Hollywood-Burbank Airport. These move-

ments carried 584,970 revenue passengers arriving at the Airport and 593,311 revenue passengers departing from the Airport.

3. In 1969 there were 22,088 individual flight operations by Boeing 727, Boeing 737 and Douglas DC-9 jet aircraft at Hollywood-Burbank Airport.

4. The PSA flights, which departed the Hollywood-Burbank Airport at 11:30 P.M. each Sunday night destined for San Diego, served 120 passengers on the average with an average of 80 being boarded at Hollywood-Burbank.

VI. The following issues of fact, and no others, remain to be litigated upon the trial:

1. Whether Hollywood-Burbank Airport is an important part of the national air transportation system and forms a vital link in interstate and intrastate air commerce.

2. Whether in the Greater Los Angeles metropolitan area Hollywood-Burbank Airport is an important satellite airport which helps in relieving the congestion at Los Angeles International Airport.

3. Whether the federal statutes and regulations and orders of the Administrator of the Federal Aviation Administration and of the Civil Aeronautics Board have completely occupied the fields of the regulation of the use of navigable airspace and aircraft operations.

4. Whether the curfew ordinance affects the use of navigable airspace and aircraft operations.

5. Whether the curfew ordinance impedes the free flow of interstate commerce.

6. Whether the needs of national uniformity demand that the regulation of the use of airspace and air traffic be prescribed by a single authority.

7. Whether the curfew ordinance conflicts with federal statutes and regulations governing the use of navigable airspace or with aircraft operations at the Hollywood-Burbank Airport.

8. Whether the curfew ordinance interferes with the operation of the national air transportation system.

9. The above issues of fact represent a distillate of plaintiffs' and intervening plaintiff's contentions of fact, heretofore filed, and it is the intention of these parties to incorporate herein all of their contentions of fact that have not been admitted by defendants.

10. (a) Defendants contend that the following issue of fact also remains to be litigated upon the trial: Whether the regularly scheduled 11:30 P.M. Sunday flight of PSA and the irregular flights of privately owned jet aircraft, in taking off from Hollywood-Burbank Airport between the hours of 11:00 P.M. and 7:00 A.M., unreasonably interfered with the peace, quiet and sleep of persons residing in the vicinity of the airport and caused a detriment which far outweighed any advantage to the public or any private persons, firms or corporations departing by jet aircraft from the airport during curfew hours.

(b) Plaintiffs and intervening plaintiff contend that the above issue is not relevant to this action and reserve their objection on that ground to any evidence offered in support of this issue.

VII. The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between the parties with respect thereto, are as follows:

1. The exhibits which the parties intend to offer are identified and set forth in their respective lists of ex-

hibits heretofore filed. The parties have reviewed each other's exhibit lists. Since these exhibits are for the most part official documents, counsel represent that they expect to find no difficulty in agreeing to the genuineness and due execution thereof. Counsel will promptly notify the Court in the event they are unable to reach such an agreement.

2. Plaintiffs and intervening plaintiff contend that defendants' Exhibit C is irrelevant for the purposes relied upon by defendants.

3. Plaintiffs and intervening plaintiff also contend that defendants' Exhibit C is hearsay.

VIII. The following issues of law, and no others, remain to be litigated upon the trial:

1. Whether the Federal Government has preempted the fields of regulation of the use of airspace and the regulation of air traffic so as to preclude enforcement of the curfew ordinance.

2. Whether enforcement of the curfew ordinance would result in an intolerable and unreasonable burden on interstate commerce in violation of the Commerce Clause (Art. I, § 8, Cl. 3) of the United States Constitution.

3. Whether the curfew ordinance constitutes an attempted regulation of a phase of the national commerce which, because of the need of national uniformity, demands that its regulation, if any, be prescribed by a single authority.

4. Whether the curfew ordinance is in conflict with federal statutes or federal regulations and is rendered void and unenforceable by the Supremacy Clause (Art. III, § 2) of the United States Constitution.

5. Whether this Court should abstain from exercising its jurisdiction and power until state issues are finally determined.

IX. The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

July 27, 1970

/s/ E. Avery Crary
United States District Judge

Approved as to form and content:

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Reporters' Transcript of Proceedings.

Filed: Jan. 29, 1971.

[4] LOS ANGELES, CALIFORNIA, TUESDAY, SEPTEMBER 15, 1970, 9:40 A.M.

THE CLERK: 70-1075, Lockheed Air Terminal v. The City of Burbank; court trial.

MR. PACKARD: Ready for the plaintiff Lockheed Air Terminal, Inc., a corporation, and Pacific Southwest Air Lines, a corporation.

MR. CHRISTOPHER: Warren Christopher for intervening plaintiff, Air Transport Association of America.

MR. SIEG: Ready for the defendant, your Honor.

MR. YOST: Ready for the amicus, your Honor.

THE COURT: Gentlemen, I am sorry I didn't get word to you I was going to be a few minutes late this morning. I went to a breakfast meeting of the State Bar and didn't get word to you last night, as we had a judges' meeting in the afternoon that went longer than I had expected.

All right. Now, let's refer as we start this matter to the issues involved, issues of law involved, as set forth in the pretrial order, and to refresh everybody's mind on them, as I understand the issues—they may not be exactly as you phrased them in the pretrial order, but substantially so.

One, has the Federal Aviation Administration so pre-empted, or the Government so pre-empted the field of [5] efficient use of airspace as to bar the enforcement of the Burbank ordinance.

Do you agree substantially that that is one of the issues?

MR. PACKARD: Yes, your Honor.

MR. CHRISTOPHER: Yes, your Honor.

MR. SIEG: Yes.

THE COURT: Does anybody disagree, let's say.
(No response.)

THE COURT: All right. Then as a part of that issue it seems to me that the question I have to determine is, is the ordinance in conflict with any federal legislation or regulation.

Isn't that really the chief issue I have to determine? Or, let's say, one of the chief issues. Does anybody disagree with that?

No. 3, as I see it, is, does the ordinance discriminate against or substantially obstruct or unreasonably burden interstate commerce.

As I see the issues, those are the chief issues I have to determine. If anybody disagrees I think we should state it now so we can discuss it further, and let's focus on those issues as we proceed to trial and the evidence unfolds.

Do any of the defendants contend that the [6] FAA does not have authority to act in the fields involved in this case? That they don't have authority. Not the question of have they pre-empted the field, but does anybody contend, any of the defendants contend they do not have the authority to act in this field?

MR. SIEG: Yes, your Honor, we so contend.

THE COURT: The City of Burbank contends they do not have the authority to act in this field.

MR. SIEG: That is correct, sir.

THE COURT: All right. Is there any issue as to whether a proprietor of an airfield—without regard to Burbank, not being a proprietor—but the proprietor of the airfield could issue an order of this nature? Not being an ordinance but an order of this nature.

What is the plaintiffs' reaction to that?

MR. CHRISTOPHER: Your Honor, I think that is an unresolved question of law that is not determined by the existing cases, but which is not involved in this proceeding.

THE COURT: Not strictly involved, no. I think you are right. It is not strictly involved, but we are going to have some collateral matters and going to have some reason from inference, and so forth.

I am wondering, do you have any position on it, with respect to a proprietor, what is the authority of a proprietor?

[7] **MR. CHRISTOPHER:** Your Honor, as I intimated in my earlier remarks, I believe that is an open question of law.

THE COURT: All right.

MR. CHRISTOPHER: And I believe the scope of the federal pre-emption, which may in some instances of air traffic control and airspace management be so pervasive as to prevent the action of even a proprietor.

But I emphasize again, I don't believe that question is here.

THE COURT: Not as such.

MR. PACKARD: Your Honor, I think in that field we have to look as if we were talking about an airport that has interstate commerce coming in as distinguished from the Stagg case, which we are familiar with, and also when you make the broad statement, may a proprietor regulate the operation of an airfield, I think we have to look at the particular airfield and what we are talking about—

THE COURT: I think that is probably true.

MR. PACKARD: —rather than a general statement as to what the law would be on a general statement.

THE COURT: There are going to be cases and I am sure there is going to be discussion of this point.

Not that it is involved in this case as such, but inferentially [8] there is going to be discussion of this point, I feel sure, before we get through. Possibly not. If it isn't raised, my prediction is that you will be differentiating cases on that ground. Maybe you will not, I don't know. We will see how it develops.

MR. PACKARD: I think in the Stagg case they had discussed, or in viewing the Stagg case there has been certain Senate statements to the effect that a proprietor of an airport may regulate its own hours of flight and so forth, and there is language in some of these reports which are before your Honor to that effect.

I concur and agree with Mr. Christopher that that issue is not before this court and it hasn't been raised as an issue in this case, but it may be a collateral issue, which may—

THE COURT: It would be a collateral issue, I believe. Don't you distinguish the Stagg case on that ground?

MR. PACKARD: Yes, definitely, that is right.

THE COURT: So there we are, right away we are starting out with it as a collateral issue. I know it is not an issue. I have stated the three issues as I see them.

Does either side care to make an opening [9] statement?

MR. PACKARD: Your Honor, I feel that insofar as the briefs heretofore that have been filed on behalf of the plaintiffs and plaintiff in intervention and the FAA, I feel there is no point in making an opening statement.

THE COURT: Anyone else?

MR. CHRISTOPHER: Yes.

THE COURT: All right, Mr. Christopher.

OPENING STATEMENT ON BEHALF OF THE
INTERVENING PLAINTIFF

MR. CHRISTOPHER: I would make a brief opening statement on behalf of the intervening plaintiff.

First, your Honor, as a preliminary matter I might say that the witness list on both sides has been substantially reduced, and it seems clear, so far as I can estimate, that we will be able to finish the case within the time that has been estimated. I believe we will be calling only five or six witnesses and I notice the defendants' witness list is now down to two.

THE COURT: Very well.

MR. CHRISTOPHER: I recognize, of course, your Honor, you have read and studied the papers filed, including our trial brief, and I don't intend to repeat the arguments there. Your statement of this morning shows [10] that you are fully familiar with them. Nor do I think it is necessary to go over the facts which have been set forth in the pretrial order and which are admitted for purposes of this proceeding.

In this opening statement, your Honor, I would refer briefly to the proof which will be adduced to show the severe national impact which will follow if a night curfew ordinance is imposed at Burbank and if, indeed, it were to be imposed at comparable airports across the nation.

Introducing this point, your Honor, I want to emphasize that my view of the cases is clear. The court could not consider, should not consider the Burbank ordinance in isolation. Burbank is an airport with scheduled interstate and intrastate operations and under the cases I believe the court should consider the effect of this ordinance as if it were imposed at all airports with comparable operations.

In the Hempstead case, which we cited in our trial brief, page 32, one of the leading cases here,—

THE COURT: That is an altitude case.

MR. CHRISTOPHER: Yes, sir.—the court said that it could not consider the ordinance in—and this is the court's phrase and I think it is a valuable one—"in the accident of its particular circumstances [11] but, rather, must consider it as if there were a set of ordinances, which taken together would prevent diversion of the aircraft elsewhere other than the town of Hempstead."

The same national consequences rule was indicated in the Southern Pacific case, which is cited in our trial brief on page 32, where the court noted, "If one state could regulate train lengths so might all with adverse national consequences." Indeed; this approach of viewing the national consequences of local ordinances or local action has been followed since 1906 in the commerce field, your Honor, followed since the Mississippi Railroad Commission case, which is also cited in our trial brief at pages 31 and 32, where the court said that if a fast train could be required to stop in the town of Magnolia, Mississippi, it could be required to stop at every small town in the state with adverse national consequences.

[12] Now, it is common knowledge that the areas surrounding the major airports are a checkerboard of overlapping and conflicting political jurisdictions.

This is illustrated by the leading cases: The Town of Hempstead case around J.F.K. Airport; City of Audubon Park case surrounding—around the Louisville Airport; the Village of Cedarhurst case involving, again, J.F.K.; the Loma Portal Civil Association case involving an attempt of a civic group to impose re-

restrictions on flight operations at Lindbergh Field in San Diego.

The net effect of these precedents and the factual situation is that if the court were to hold that Burbank could enforce the curfew ordinance, others would follow, for this is a contagious kind of an action. We believe that the court should consider the national effect on the assumption that similar ordinances would be imposed at all comparable airports.

These national effects, your Honor, the testimony will show, are severe and adverse. We will show that if a night curfew were imposed at all airports with scheduled operations comparable to Burbank Airport, more than 1,000 flights every day would be in violation of such ordinances. Not 1,000 a year or 1,000 a month, but 1,000 flights every day would be in violation of such ordinances.

We will show that not only would those 1,000 [13] be affected but many more would have to be canceled or altered in order to balance the aircraft usage and operation.

Now, out of these cancellations or adjustments would come, the evidence will show, your Honor, severe inconvenience and hardship to passengers all over the country who must or desire to travel at night.

It would result, the evidence will show, in frustration to shippers who depend upon night flights to deliver their products, especially perishable goods and time-dated products.

The evidence will show that the scheduling situation would be thrown into near chaos, aggravated as it is by the six time zones which mark our country.

Another result, the evidence will show, your Honor, of such cancellation would be to increase congestion

in the very hours in which the airways are now most congested, the hours of early evening.

The evidence will also show that the application of such ordinances on a national basis would have most adverse effect on the maintenance programs, finely tuned maintenance programs of the airplanes.

Moreover, your Honor, we will show that such an imposition of ordinances on a national basis would impose an enormous economic penalty on the airlines which are already in severe economic condition.

[14] Finally, your Honor, on this point we will show that based upon a study at the four major airports in this country more than 48 percent of all airmail moves during the curfew hours. If these ordinances were extended on a national basis, the mail could not move at night and would be delayed at least one day.

Our evidence will show the severe economic effect, especially for the financial industry, of such a curtailment of airmail service.

Now, your Honor, these adverse national consequences are, we think, relevant on each of the three issues that your Honor has stated as being before the court.

On the pre-emption point, we think the severe adverse national consequences show that the federal interest is so dominant as to preclude local action by ordinance.

On the supremacy clause issue, your Honor, which you stated is the second issue, we think these adverse national consequences show the need in the most urgent terms for a federal system with a single uniform rule.

Finally, on the third issue that your Honor stated, the commerce clause issue, we think these adverse na-

sional consequences that the evidence will show demonstrate that these local restrictions constitute an unconstitutional burden on interstate commerce and they, therefore, are invalid.

Thank you, your Honor.

[15] THE COURT: Thank you, Mr. Christopher.

Mr. Sieg.

MR. SIEG: Your Honor, if you please, I would prefer to delay any legal argument until the evidence is in. I am not at all sure at this point what additional evidence is either pertinent or necessary.

As I view the matter at this point in time, the basic question is the question of law, and there are sufficient facts now before the court to make that determination.

But I must take some exception to counsel's statement and contention that the court must view this ordinance as if it were applicable to or would be made applicable to airports throughout the country. I am certain that the court is well aware at this point in time that Lockheed Airport is a special situation. It is a private airport. It is within the City of Burbank substantially. It should be treated in terms of the airport as it exists unrelated to any other airports.

I will in time direct the court's attention more specifically to the Airport and Airways Act of 1970, which has been frequently cited, which provides for grants, among other things, for airport improvement extensions, lighting, and so forth. And that Act allows such grants only to airports operated by public agencies. This Lockheed Airport, as it exists in its present ownership, is not and [16] cannot be part of the National Airport System provided for under that Act.

I won't belabor that point now. But I would bring to the court's attention something that has bothered me. The court will note, as has already been indicated, we have cut our witnesses to two. We originally prepared our case on the basis of the pleadings. And, of course, maybe belatedly, with true realization of what was taking place we found that the original due process contention made by the original plaintiffs has been eliminated as an issue.

Now, as we understand this—and we assume this must be true—the court has to assume on the basis of the present record and the joint pretrial statement that the ordinance enacted by the Council of the City of Burbank is a valid, subsisting ordinance within the police power of the city; is not unreasonable nor is it arbitrary, and it was enacted and based upon facts which were more than sufficient to support the enactment insofar as a police power ordinance.

Now, if that contention—I am assuming this must be so, since the contention has been withdrawn. Now this raises another problem, at least as far as the City of Burbank is concerned. Why did the plaintiffs withdraw the contention? I think this should be the subject of some inquiry.

[17] Is it the intent of the plaintiffs in this matter to use this contention in another action, a federal action or a state action? Was it withdrawn because of one of the issues raised which was abstention, since the California Constitution also provides that property shall not be taken without due process?

I don't know. But I do feel that before we embark on the evidence this issue should be made crystal clear so no one will be misled in terms of proof.

Thank you.

THE COURT: All right.

Does anybody want to respond to that, any of the plaintiffs, on this issue of due process and withdrawal of the issues?

MR. CHRISTOPHER: Your Honor, I would respond by saying that the issues as stated by your Honor are the ones that we intend to raise here. The issue of due process is not being pressed at this time upon due deliberation and consideration. It is one of those examples of the pretrial process narrowing the issues and bringing a case to a more manageable focus.

THE COURT: Very well. Now does anyone else have any comments or want to make any statements by way of an opening statement?

All right. The plaintiffs' first witness.

[18] **MR. PACKARD:** Your Honor, before we get the first witness I think we want to read in admitted facts. Mr. Christopher, I think, will do that.

THE COURT: All right. You mean as set forth in the pretrial order?

MR. PACKARD: Yes. We would like to reach some understanding with regard to that.

THE COURT: All right.

MR. CHRISTOPHER: Your Honor, if I may correct something I said before we get too far away from it, your Honor referred to the Hempstead case as being an altitude case. There is a nuance of difference there. The Hempstead case was a noise level case—

THE COURT: Yes.

MR. CHRISTOPHER: —which really translates itself very quickly into an altitude case. So I didn't want to get too far from that without correcting myself.

THE COURT: It's a safety measure case. Yes.

MR. CHRISTOPHER: Yes.



Your Honor, in the pretrial conference order there are 31 paragraphs of facts which are admitted. I believe we need to take them in three separate pieces in order to be faithful to Mr. Sieg's possibility of objection.

So I would first offer paragraphs 1 through 13 of the admitted facts in the pretrial order. I believe I [19] am correct in saying that Mr. Sieg has not reserved any objection with respect to those paragraphs 1 through 13.

MR. SIEG: That's true.

THE COURT: All right. Paragraphs 1 through 13 are admitted in evidence as being admissions of stipulated facts by the parties.

MR. CHRISTOPHER: Thank you, your Honor.

THE COURT: 14 to 27, I believe he objects to on materiality.

MR. CHRISTOPHER: Paragraphs 14 through 27 are objected to as to materiality.

THE COURT: Yes.

MR. CHRISTOPHER: They represent, your Honor, various federal regulations and various actions of the Federal Aviation Agency with respect to this matter.

Would you prefer that I take them up one paragraph at a time?

THE COURT: Well, I suppose it will be necessary at least to start out that way in order to allow them to make their objections.

Is your objection the same to each one, Mr. Sieg?

MR. SIEG: Yes, your Honor.

THE COURT: On the theory that, what, now? That CAB controls carriers and it isn't involved here?

[20] MR. SIEG: Yes. As to the issues that are before the court our objection is that these additional paragraphs of admitted facts are irrelevant and immaterial.

THE COURT: You say they are irrelevant and immaterial. Why?

MR. SIEG: For the reason that what is before the court is a question of law applicable to a private airport, an ordinance that is applicable only to hours of 11:00 to 7:00 a.m. in the morning affecting no interstate carriers. The only intrastate carrier affected is PSA. The others are corporate jet flights. Those are basically the reasons why we feel that these paragraphs are immaterial.

THE COURT: All right, Mr. Christopher, do you want to respond?

MR. CHRISTOPHER: Yes, your Honor. I would move the admission of paragraphs 14 through 27 on the ground that each of them is relevant to each of the three issues which is before the court in this case. These paragraphs show the scope of federal regulation which, of course, is the crux of the question of federal pre-emption.

They show the basis on which each of the carriers which serves Hollywood-Burbank both interstate and the intrastate carriers are licensed to do so and the regulations under which they do so.

[21] These paragraphs show the restrictions under which the planes land and under which they take off. They show the operation of federal tower at Hollywood-Burbank Airport.

Within these paragraphs, your Honor—and I would be glad to discuss them one by one if necessary—but within these paragraphs is the basic federal regula-

tion of air commerce both interstate and intrastate which is conducted at Hollywood-Burbank Airport relevant, therefore, in my view, to each of the three issues.

THE COURT: Well, do I recall correctly that PSA has a certificate?

MR. CHRISTOPHER: Yes, your Honor. PSA has a certificate of public convenience and necessity.

THE COURT: From the California Public Utilities Commission?

MR. CHRISTOPHER: Yes, your Honor.

THE COURT: But not from the Civil Aeronautics Board?

MR. CHRISTOPHER: That's correct, your Honor; not from the Civil Aeronautics Board. That's stated in paragraph No. 17.

THE COURT: Yes.

MR. CHRISTOPHER: As far as its operations, PSA operates under federal jurisdiction and guidance. You [22] will notice in paragraph 17—

THE COURT: You mean that FAA controls the towers and the flight of the planes, is that what you mean?

MR. CHRISTOPHER: Yes, your Honor. And PSA is required to have a commercial operating certificate from the FAA as set forth in paragraph 17. It is required to operate under operations specifications set forth by the FAA. Of course, its planes fly under the control of the Hollywood-Burbank tower and the Los Angeles center.

THE COURT: Well, I am going to admit Exhibits 14 to 27. We will discuss further, of course—there will be further discussion about the pertinence. But it seems to me that at least they have arguable pertinence.

Now, then, what about 28 to 31?

MR. CHRISTOPHER: Your Honor, I move the admission of paragraphs 28 through 31 of the pretrial conference order. If I understand correctly, Mr. Sieg has no objection to the admission of these.

THE COURT: All right. That being the case, 28 through 31, inclusive, are ordered in evidence as admissions and stipulated facts.

MR. CHRISTOPHER: Now, your Honor, at the time of the brief hearing on the motion for preliminary injunction testimony was taken of a Mr. Wescott of PSA. That appears [23] at the reporter's transcript for Wednesday, May 27, 1970, at pages 10 through 40.

Mr. Sieg, you will find that at the front of that document, the volume which I have given you there.

Your Honor, I would move the admission, acceptance into this record of the testimony of Mr. Wescott.

THE COURT: I think we better read it in. I don't like to have depositions just in that way. I think it should be read in.

MR. PACKARD: Do you want to read the questions? I will take the stand and read the answers.

THE COURT: All right.

MR. PACKARD: Do you want to handle it that way, your Honor?

THE COURT: Yes. I don't care who reads the questions and the answers. But I want the deposition read into the record so the record will be complete, then, without having to refer to a lot of other documents.

MR. PACKARD: I think the record should show that Mr. Floyd E. Wescott was duly sworn, called on behalf of the plaintiff Pacific Southwest Airlines, and

was examined by Mr. McInnis. Mr. Christopher will be Mr. McInnis and I will be Mr. Wescott here.

THE COURT: On July 27, 1970. And it was as a part of the—

[24] **MR. PACKARD:** May the 27th.

THE COURT: What?

MR. PACKARD: May the 27th, 1970.

THE COURT: Oh, Monday. I see. May 27th.

MR. PACKARD: Wednesday, May the 27th, 1970.

THE COURT: On May 27, 1970, in connection with a part of the hearing on preliminary injunction; is that correct?

MR. PACKARD: Yes, your Honor.

(The direct testimony of Floyd E. Wescott was read as follows, the questions being read by Mr. Christopher and the answers by Mr. Packard:)

"Q What is your present position or occupation, Mr. Wescott?

"A Vice President Operations, Pacific Southwest Airlines.

"Q How long have you held such position with that Airline?

"A Vice President position about six years. I have been completely in charge of operations for about 12 years.

"Q State briefly what are operations as they are classified in that Airline.

"A At P.S.A. we classify the operations to be responsible for the scheduling of aircraft, [25] the maintenance of aircraft, the crewing of the flight schedule and the efficient and quick movement of all of our fleet.

"Q Are you familiar generally speaking with the type of aircraft operated by P.S.A. and its

schedules, including Burbank-Hollywood — Hollywood-Burbank Airport?

"A Yes, I am.

"Q Have you today examined Exhibit A to the Complaint in this matter as on file?

"A Yes, sir.

"MR. McINNIS: May I approach the witness, your Honor?

"THE COURT: Surely.

"BY MR. McINNIS:

"Q Looking at Exhibit A to the Complaint, Mr. Wescott, you examined that with me, did you, this noon?

"A Yes, I did.

"Q You have seen this on other occasions in your activities as Operations Officer?

"A Yes.

"Q Is it correct, as illustrated on Exhibit A, that Lockheed Airport is bounded on [26] several sides by the County of Los Angeles and City of Los Angeles?

"A Yes, sir.

"Q And is it correct that in that exhibit the runways are shown, as depicted in the marked-off square of the airfield?

"A Yes, sir.

"Q Is it further correct that the City of Burbank lies on roughly two sides partially of the airport, as visualized in that exhibit?

"A Yes, sir.

"Q Are you acquainted with the runways at Hollywood-Burbank?

"A Yes, sir.

"Q And is there a runway known as Runway 25?

"A Yes, sir.

"Q Would you be so kind as to point to the direction that runway runs so the Court, if he desires, will have it, or tell him so he can follow it on his map?

"A Runway 25 runs on a magnetic—

"Q Would you hold it up so the Court can see it, as you illustrate with your finger?

[27] "A (Witness complies.) A compass heading from east to west at a 250-degree heading, which is just a little bit south of straight west.

"Q Assuming an aircraft is to use Runway 25, would it at any time be in the take-off and the departure over any portion of the City of Burbank?

"A No, sir, it would immediately be over the North Hollywood district, which is the City of Los Angeles.

"Q And would that on the map apparently be near the words 'San Fernando Valley'—

"A Yes.

"Q —and below that 'North Hollywood'?

"A Yes, sir, it would.

"Q What is the normal flight pattern set by the FAA to go out on this departure on Runway 25 going south?

"A An airplane with a southern destination, such as San Diego, would take off on Runway 25 and after he was airborne he would take a gradual left turn, which would take him south. Never would he go over the City of [28] Burbank.

"Q Is there a runway known as 33?

"A Yes, sir.

"Q Would you indicate or state as best you can for the record, and point out so that the Court may follow if he desires, Runway 33?

"A Runway 33 goes in a northwesterly direction, which also would go up and out over the City of Los Angeles.

"Q Would a departure on Runway 33 in any way go over any part of the City of Burbank, regardless of whether it is residential or commercial property?

"A No, sir.

"Q Do you know whether or not Runways 25 and 33 may be used in departures for your aircraft departing at 11:30 on Sunday night?

"A Yes, sir, they would be suitable for our use.

"Q And as far as that departure at 11:30 is concerned, where does it originate?

"A That flight originates in Oakland, California, and goes to San Jose and [29] makes one stop, and then to Burbank and then on to San Diego and termination.

"Q Have you made a study to determine the passenger load that is carried on that aircraft into San Diego?

"A Yes, sir, I have.

"Q Would you advise us as to your findings?

"A We find that in the past eight or nine weeks this particular flight has averaged about 125 passengers out of Burbank into San Diego. 80 to 85 of these passengers have boarded in Burbank for destination in San Diego.

"Q Are you familiar with the fact whether or not these are comprised substantially of Military personnel returning to San Diego?

"A Yes, sir, we have established that fact. At one time a couple of years ago we planned to discontinue this flight and we had quite a bit of comment from the Military in San Diego, in addition to parents of young men that were in the Military, who lived in the Burbank-Glendale area.

"Q Does Pacific Southwest Airlines [30] contemplate any other flight than the continuation of its 11:30 flight at this time?

"A No, sir.

"Q Are you familiar with the scheduling of aircraft to know how difficult it is to cancel that flight out in the day's operations?

"A Yes, sir.

"Q Would you advise the Court on the procedures that it would take and the detriment to the company that would arise by reason of having to cancel this on short notice?

"A If we would have to cancel this particular flight we would have to, No. 1, take that flight into the Los Angeles Airport, because once we got it into Burbank, of course, we couldn't depart.

"We need the airplane in San Diego on this particular night to perform necessary maintenance. If we landed the plane in Los Angeles we would have to secure bus transportation to take upwards of 150 people, who would have come out of Oakland and San Jose, over to Burbank.

"We would have to delay the people that were going on to San Diego in Los Angeles until [31] such time as we could pick up the 11:30 board-

ing passengers at Burbank and bring them to Los Angeles.

"Q As far as the aircraft itself is concerned, and the function of maintenance in accordance with FAA Regulations, does it come to San Diego for that purpose on Sunday night?

"A Yes, sir, that airplane overnights in Oakland on Saturday night and this particular aircraft originates in Oakland at 8:00 o'clock Sunday morning and runs through a sequence of nine or ten trips and then is scheduled for San Diego, due to necessary maintenance that can only be performed in San Diego.

"Q In the operations of an airline, is it the custom and practice to rotate aircraft so that they complete a certain day and arrive at the maintenance shop so they can be worked upon during night hours or early morning?

"A That is correct.

"Q Is this being done as far as this flight is concerned out of Hollywood-Burbank?

"A Yes, sir.

"Q What is the number of that flight, [32] if you know?

"A Flight 502.

"Q What type of aircraft is it?

"A It is a Boeing 727-200.

"Q Does it have three jet engines?

"A Yes, sir.

"Q Are you familiar with the operation of a jet aircraft?

"A Yes, sir.

"Q Do you know whether or not once the engines are started they have to be revved up, as propeller aircraft does?

"A No, sir.

"Q By that answer you mean they do not?

"A They do not.

"Q Assuming you are using Runway 25 or 33, in taxiing out that runway would the engines have to be revved up in a jet?

"A No, sir, very little power to move the airplane.

"Q Assuming the airplane is taking off on Runway 25 or 33, would it consume the entire runway?

"A Not necessarily, no, sir. Probably [33] no more than 50 per cent.

"Q Do you know the rate of speed at which the 727-200 jet aircraft takes off the ground?

"A It would leave the ground in the vicinity of 125 to 150 miles an hour.

"Q Do you know the rate of climb?

"A During the immediate take-off, after about one minute the airplane would be approximately fifteen to eighteen hundred feet altitude.

"Q And looking at Exhibit A to the Complaint and visualizing Runways 33 or 25 can you state in seconds how long that airplane would be on the ground on Lockheed Airport before it went over the City of Los Angeles or San Fernando Valley?

"A I would have to have some power charts to get that exactly, but I could—

"Q Give us an approximation.

"A —give a fair guess. I would say the airplane would be off the ground in about 15 or 20

seconds and within a minute it would be well out beyond the boundary of the City of Burbank.

[34] "Q When you say 'the boundary of the City of Burbank,' you mean the boundary on what would be the east, is it, side of the airfield?

"A If it went off on Runway 25 it would be on the westbound side of Burbank.

"Q On the west. We have established, have we not, that the minute the aircraft starts rolling it is going away from the boundary line of Burbank?

"A That is true.

"Q So in sight of some seconds to a minute it would be out over Los Angeles, is that correct?

"A That is correct.

"Q Now, have you further determined whether or not there are reservations having been made for this Sunday night flight for Memorial Day, this Sunday?

"A At today's booking this morning before we left the office that particular flight was about 95 per cent sold out for this Sunday night.

"Q How many travel agents, approximately, have Pacific Southwest Airline tickets, [35] who could sell a ticket on this flight?

"A We have 950 to a thousand travel agents throughout the area who could sell tickets on this particular flight.

"Q Have you made a determination, at my request today, to find out whether or not the reservations for July Fourth weekend, which is five Sundays from now?

"A: We do have reservations booked for this particular flight up into July, yes, sir.

"Q: Is it correct that Pacific Southwest Airlines has been running this flight for some period of time prior to this point?

"A: We have run this particular flight for almost two years. We have had flights departing Burbank after 11:00 p.m. for about the last six years.

"Q: Assuming this flight were to be cancelled, would there be losses to the company in revenues by reason of the inability to take these people through Burbank to San Diego?

"A: Yes, there would be, and there would be additional expenses involved in transporting the people from Burbank to Los [36] Angeles and Los Angeles to Burbank, plus a lot of ill will which would be created among the traveling public.

"Q: Do you have an opinion, by way of an approximation, of the loss in dollars per flight if such a procedure were to be done at this time?

"A: It is very difficult to put an exact dollar price on it. In terms of revenue itself, that is a simple matter of arithmetic, which would probably run a thousand to \$1500.00. But the fact that we weren't able to get our airplane into San Diego to perform some maintenance, if we had to hold it over until the following morning we would have to ferry the airplane to San Diego, because that is where it originates a flight the next day. We would probably have to bring some maintenance people to Burbank to perform some maintenance.

"I would suppose we could say we might get up as high as \$5,000.00, considering all the unknowns.

"Q Assuming that this flight were to be cancelled as of today, so it did not fly this Sunday, would that require an adjustment or [37] cancellation of other flights at other areas to the company's monetary detriment?

"A It would, because we would have to rearrange a whole sequence of flights. This particular aircraft operates eight or nine trips on this particular day, so if we were to back everything up 45 minutes, in order to get out of Burbank two minutes before 11:00, now we are talking about probably inconveniencing—and there would be no way to cover them on this particular Sunday because all flights are pretty solid. But we could get into 1500 to 2,000 people.

"Q Is it true that certain days of the weekend are heavier traveled than other days?

"A Yes, sir, our experience has been that Fridays and Sundays are always heavy traffic days. This particular holiday a lot of companies and firms are taking the Friday off, so heavy traffic this particular weekend is on Thursday, but the returning traffic, everybody has to be back to work on Monday, so the returning traffic is on Sunday.

"Q Mr. Wescott, are you familiar [38] with propellered-type driven aircraft?

"A Yes, sir.

"Q Do you know whether or not engines of that type have to be revved up before they are permitted to take off?

"A Yes, sir.

"Q Is that noisy?

"A Yes, sir.

"Q Do you know whether or not the ordinance is limited only to jet aircraft, as you are informed of its contents at this time?

"A To the best of my knowledge the ordinance only pertains to jet aircraft, jet driven aircraft.

"THE COURT: That is already stipulated to, isn't it?

"MR. SIEG: Yes, sir.

"MR. McINNIS: I don't know whether it is stipulated in this or not.

"THE COURT: It does refer only to jet aircraft. There is no question about that.

"MR. McINNIS: I don't know whether there is a stipulation in the record or not.

"As your Honor knows, there has been one [39] exemption—if that is the correct word—already granted, and that is to allow a departure at 6:30 in the morning against the 7:00 o'clock ordinance.

"THE COURT: I think there is more than one exemption, as I recall.

"MR. McINNIS: I'm not too aware—

"THE COURT: Some of them are classified as emergencies—I think both of them are, aren't they. Anyway, we will get to that. There are some exemptions that have already been granted.

"MR. McINNIS: Yes. Does your Honor care to have that in the record?

"THE COURT: It doesn't make any difference. It is in the memoranda that has been filed.

"MR. McINNIS: I see.

"THE COURT: You can put it in the record, though, if you want.

"MR. McINNIS: No, I don't care to do that, if it is in there. I just haven't read it too thoroughly.

"THE COURT: I know, you haven't had a chance to familiarize yourself thoroughly with [40] it, I guess."

MR. CHRISTOPHER: Now the examination resumes by Mr. McInnis.

"Q Does Pacific Southwest Airlines own any propeller drive aircraft?

"A No, sir.

"Q It has no aircraft to replace this 11:30 by way of a propeller driven aircraft and not be in violation of the ordinance?

"A No, Sir.

"Q It is a pure jet fleet?

"A Yes, sir.

"Q Have you been authorized by management of the company, including the President, that you could make a statement to the Court here, that if the Court saw fit to do so, rather than a preliminary injunction or continuation of the temporary restraining order being in full force and effect until such time as the matter is heard on the merits, that the company would accept a restraint, temporary restraining order, continuation of this order to permit this flight, or seven flights, or through the Fourth of July?

[41] "A Yes, sir.

"THE COURT: I am not quite clear as to just what you said.

"You are not objecting to a restraining order that would do what?

"MR. McINNIS: That would permit these flights to continue.

"THE COURT: Through the Fourth of July weekend?

"MR. McINNIS: Through the Fourth of July weekend.

"Q And that you would not request—

"MR. McINNIS: What I am trying to say is the company is not requesting any further restraint than to get out of the position of its reservations of these two big weekends, which your Honor takes judicial notice, I guess, are probably the biggest in the year, and in the midst of the airlines' peak traffic.

"THE COURT: What would you do after the Fourth of July weekend?

"MR. McINNIS: We by then would adjust our schedule, take our beating and await a ruling of this Court.

"THE COURT: I see."

[42] MR. CHRISTOPHER: Now, the questioning resumes by Mr. McInnis.

"Q Is what I said substantially management's position, which you have been instructed to advise the Court?

"A Yes, sir, we would do that.

"MR. McINNIS: Your Honor, I have no further questions of the witness.

"I assume you take notice of all documents heretofore filed, including the Complaint and the attachments thereto. And as to the validity or invalidity of the ordinance, I assume that is a matter to discuss with you without a witness."

"THE COURT: Yes.

"MR. McINNIS: Thank you."

THE COURT: All right. Cross-examine.

[43] MR. CHRISTOPHER: Interrupting myself now, Mr. Sieg, would you like to have the cross examination read into the record?

MR. SIEG: Yes, please.

May I proceed, your Honor?

THE COURT: Yes.

(Whereupon, the cross examination of the testimony of Witness Wescott was read as follows:)

"BY MR. SIEG:

"Q Mr. Wescott, you filed an affidavit in these proceedings, did you not?

"A Yes, sir.

"Q And you are presently familiar with its contents?

"A Yes, sir.

"Q I direct your attention—and if necessary I will give you a copy—to the latter part of the affidavit, page 3, lines 1 to 5. It is stated there:

"At one time in 1967, PACIFIC SOUTHWEST AIRLINES published a schedule which did not include a Sunday night departure from Hollywood-Burbank Airport at 11:00 P.M. However, shortly thereafter, this late evening flight [44] was reinstated due to the volume of complaints and inquiries from the traveling public."

"Did you follow me, sir?

"A Yes, sir.

"Q Now, at that particular time, in 1967, and I assume prior to that time, you did have a 11:30 flight?

"A That is correct.

"Q And tell me, if you can, what the reasons were for elimination of this 11:30 flight."

"A Well, at the particular time we were having some equipment problems, shortages and re-ar-

ranging of our schedule we thought we could forego this.

"Q For how long a period did you forego the 11:30 flight?

"A We never did forego it at all. We published the schedule about a month or six weeks before it was to be effective and passengers who used that flight, when they found out about it, they registered a lot of complaints and comments, so we actually never did discontinue it.

"Q You did not discontinue it?

"A No, sir.

[45] "Q Now, when you did reschedule, however, did you change all of your other flights?

"A We had to change a few of them, yes. I can't tell you exactly how many.

"Q Well, can you give me an example of which ones you had to change?

"A I wouldn't be able to do that unless I could have reference to the particular schedule in 1967.

"Q Do you have an earlier flight to Hollywood-Burbank Airport from Oakland, is it?

"A I wouldn't be able to tell that without reference to—we do have earlier flights, yes, from Oakland.

"Q How much earlier?

"A I am sorry, I can't state that from memory.

"MR. McINNIS: May I give the witness a schedule, with your Honor's permission?

"THE COURT: Yes.

"THE WITNESS: Oakland to San Diego on Sundays only, we have a departure at 10:00,

10:15 and 11:45. They do not go through Los Angeles.

"THE COURT: Are those all A.M.?

"THE WITNESS: P.M.

[46] "THE COURT: All P.M. hours?

"THE WITNESS: Yes. We have several during the day.

"THE COURT: You say one at 11:45 P.M., departure from Oakland?

"THE WITNESS: From Oakland, yes, sir.

"THE COURT: That doesn't go to Los Angeles?

"THE WITNESS: Yes, sir.

"THE COURT: It stays there?

"THE WITNESS: No, it comes on to San Diego but it goes through Los Angeles.

"THE COURT: Los Angeles and not Burbank?

"THE WITNESS: That is correct.

"BY MR. SEIG:

"Q This 11:30 flight from Hollywood-Burbank, at what hour does it leave Oakland?

"A That leaves Oakland at 10:00 P.M.

"Q 10:00 P.M.?

"A That is correct.

"Q So you have two flights leaving Oakland at the same time on Sunday night, one going to Hollywood-Burbank Airport and the other going to L. A. International Airport?

"A No, one leaves at 10:00 o'clock [47] through Burbank. That is the last flight through Burbank. A 10:15 departure through Los Angeles.

"Q What I am pointing out, and maybe I misunderstood you, you gave me three times, 10:00 P.M., 10:15 P.M. and 11:45 P.M., and I thought you stated that all of those flights went through L. A. International to San Diego.

"A If I said that I was in error. The 10:00 P.M. departure goes through Burbank.

"Q There is just one 10:00 P.M. departure of your airline from Oakland for San Diego?

"A No, sir.

"Q I am sorry.

"THE COURT: Do you want them all for the 24 hours?

"MR. SIEG: No, sir, I am only interested in the night flights.

"THE WITNESS: To answer your question, maybe I can clear it up, of the three flights, one goes through Burbank and two of them go through Los Angeles.

"THE COURT: There is only one night flight that goes through Burbank?

"THE WITNESS: That is correct.

[48] "THE COURT: All right.

"BY MR. SIEG:

"Q It leaves Oakland at 10:00 P.M.?

"A That is correct.

"Q And departs Hollywood-Burbank at 11:30 P.M.?

"A That is correct.

"Q And when does that arrive in San Diego?

"A 11:55 P.M.

"Q So as far as departures from Oakland for San Diego, you have later flights departing Oakland, 10:15 and 11:45 P.M.?

"A That is correct.

"Q Those two go through L. A. Airport instead of Burbank?

"A Yes, sir.

"Q Now, if you would, Mr. Wescott, would you refer again to Exhibit A of the Complaint?

"(Witness complies.)

"Q And the map, and may I ask you this question: The portion delineated in black, I believe, on the original in a color.

"THE COURT: Blue. Is that Burbank? [49] There are two boundaries, one in blue and one in red.

"MR. SIEG: Yes.

"THE COURT: All right. Can you tell whether the blue outlines Burbank or not?

"THE WITNESS: That is right. North Hollywood on the west and Burbank is on the right.

"BY MR. SIEG:

"Q May I ask you this question: All of the areas delineated in red or blue are within the City of Burbank, are they not?

"A To the best of my knowledge, yes, sir.

"Q Now, you have referred in your direct testimony to Runways 25 and 33.

"A Yes, sir.

"Q May I ask you, is there a Runway No. 15?

"A Yes, sir.

"Q And will you in some manner indicate to the court that particular runway?

"A Yes. Runway 15 is right here (indicating). It takes off in a southeasterly direction.

"THE COURT: Is it on this map?"

[50] "THE WITNESS: Yes."

"THE COURT: It is the narrow runway?"

"THE WITNESS: It is this one right here, sir (indicating).

"It is right here (indicating), what we refer to as the north-south runway (indicating).

"THE COURT: That is marked 25 on my map."

"THE WITNESS: Runway 15 (indicating).

"THE COURT: It says '25' here. There is the

"25' (indicating). That is the one you talked about before.

"You described Runways 25 and 33."

"THE WITNESS: That is right."

"THE COURT: Is there a 15?"

"THE WITNESS: Runway 7 and Runway 25."

"THE COURT: Yes, but he asked about a 15."

"Didn't you?"

"MR. SIEG: Yes, your Honor."

"THE COURT: Is there a Runway 15?"

"THE WITNESS: Runway 15, yes, sir (indicating).

"THE COURT: Where is it?"

"THE WITNESS: On the north-south runway, sir (indicating).

[51] "THE COURT: It isn't marked here?"

"THE WITNESS: 150 degrees—"

"THE COURT: Will you mark it on this Exhibit A?"

"THE WITNESS: It is 150 degrees—the opposite of Runway 33."

"BY MR. SIEG:

"Q Will you mark it on the Judge's copy?

"THE COURT: Put '15' there. It is 33 and 15, is that what you are saying?

"THE WITNESS: Yes, sir, right here (indicating).

"THE COURT: It is the same physical runway?

"THE WITNESS: 15 in one direction and 33 in another.

"THE COURT: Fine. All right. I understand. We will mark it.

"It isn't marked on this exhibit.

"MR. McINNIS: Does your Honor have on your exhibit marked 25 and 33 runways?

"THE COURT: Yes, 25 and 33 are marked.

"He says 33 is 15 in taking off in the opposite direction.

[52] "MR. McINNIS: That is correct.

"THE COURT: All right.

"BY MR. SIEG:

"Q Just to complete the runways at the airport, is there also a No. 7 Runway?

"A Yes.

"Q Again, would you—

"THE COURT: It shows on Exhibit A. Runway 7 is marked.

"THE WITNESS: East and west.

"THE COURT: It is east and west and the opposite direction to 25, I gather, from the map.

"Is that right?

"THE WITNESS: That is correct, sir.

"THE COURT: All right.

"BY MR. SIEG: Now, No. 25 as such is for takeoffs from

east to west, is that correct?

"A That is correct.

"Q And in the reverse, No. 7 is takeoff—for takeoffs from west to east?

"A That is correct.

"Q Just to re-emphasize, 33 is takeoff from south to north?

[53] "A That is correct.

"Q And 15 is for takeoff from north to south?

"A Yes, sir.

"Q Where are your offices, Mr. Wescott?

"A My own offices?

"A Yes.

"A San Diego, California.

"Q Do you have an office at the airport,—

"A Yes.

"Q Hollywood-Burbank Airport?

"THE COURT: Do you mean P.S.A. or personally?

"THE WITNESS: I do not.

"MR. SIEG: Yes.

"THE WITNESS: P.S.A. does, yes, sir.

"BY MR. SIEG:

"Q Are you in any wise familiar with the airport's operations?

"A Yes, sir.

"Q All right. Are you familiar with which runway is used with the greatest frequency?

"A Runway 15 is what the airport terms [54] a preferential runway.

"Q And this is a runway P.S.A. uses with the greatest frequency?

"A We try to avoid it in connection with the noise abatement program of Burbank whenever we can, especially in the hours before 7:00 A.M. and 11:00 P.M.

"Q May I ask you, were you in this city on Mother's Day?

"A No, sir.

"Q And you do not know of your own knowledge which way the 11:30 P.S.A. flight, or which runway it used for taking off?

"A No, sir, I am sorry, I don't.

"Q And the succeeding Sundays up to the present time, do you know which runway it used in taking off?

"A No, sir, I don't.

"Q So, in other words, you have no knowledge as to which runway is used most frequently for this P.S.A. 11:30 flight?

"A I would have to refer to records; I don't know that.

"Q As to this 11:30 P.M. Sunday Flight, Mr. Wescott, is it possible under any [55] arrangements that you may have or may be able to make to have that flight likewise use the L.A. International Airport?

"A We could, but we don't need a flight at 11:30. We already have one from Los Angeles and this flight services the people in the San Fernando Valley.

"Q In other words, there is enough passenger capacity on your 11:30 flight or you could make such an arrangement to accommodate those passengers?

"A Not now anymore.

"A What do you mean, 'not now anymore'?

"A We don't have any space.

"Q You mean because of the reservations—

"A Yes, sir.

"A —for the Memorial Day weekend?

"A That is true.

"A What about the Fourth of July weekend?

"A Well, we are not completely sold out, but we are roughly about 50 percent. The people want the flight into Burbank. They don't want to go to Los Angeles, they want to go to [56] Burbank and they want to depart from Burbank because that is where they live.

"Q How do you know this to be true, Mr. Wescott?

"A Well, during this particular period when we did try to discontinue this flight we got a lot of comments from people in the San Fernando Valley and in the area of the Lockheed Air Terminal, that they would like to have that flight reinstated.

"Q Do you personally receive these comments, these complaints?

"A Not all of them, but they come to me through our PR department, through our sales department and in samplings of the public opinion. We had a few letters that came in from that airplane, passengers on the airplane, that would like to have the flight continued.

"Q For example, could you not, without any great inconvenience to the public or to your company, schedule the departure of the flight at Oakland so that it would arrive here prior to 11:00 P.M. and depart prior to 11:00 P.M.?

"A Not under our present schedule because that airplane that makes that departure [57] at 10:00 o'clock in Oakland doesn't arrive there until 9:35.

"Q Where does it come from?

"A San Diego.

"Q And you have no other aircraft that can be utilized for this purpose?

"A No, sir, Sunday nights we operate every piece of equipment that we have to maximum.

"THE COURT: When does it get in Oakland from San Diego?

"THE WITNESS: It arrives at Oakland at 9:35, I believe. 9:30 or 9:35, I don't have the exact time. We like to have a minimum of 30 to 40 minutes to turn the airplanes around, service them, clean them up and refuel them, and what not.

"BY MR. SIEG:

"Q In view of the offer of counsel as to the extent of the restraint that he could agree to, what will you do to reschedule these flights after July 4th?

"A Well, this becomes a sort of a routine job, you might say, when you are making a four-week schedule.

"What we are concerned with now is that [58] we have people already booked for this flight—

"THE COURT: But he wants to know how will you reschedule it now after the Fourth—I mean, assuming that you had until the week end of the 5th of July to do it, he wants to know how would you reschedule it? What would you actually do?

"THE WITNESS: We would have to rearrange probably four or five different airplanes to arrive at these different departure times.

"BY MR. SIEG:

"Q But you would have no problem in doing this?

"A No problem—no more problem than we have whenever we make a whole new reschedule. It is a big problem, but that is part of our business.

"THE COURT: How many planes would you reschedule, now? Suppose you were going to do this, it was a fait accompli, and you were going to do this, how many planes would you have to reschedule?

"THE WITNESS: I can't answer that, because it doesn't involve maybe just that one—if we were to just take the one particular [59] airplane we would have to start out about an hour earlier in the morning, which would throw of nine or ten departures during the day over what they are right now.

"THE COURT: Let me ask you this: Where does this plane come from, the plane that leaves San Diego that goes to Oakland and gets to Oakland at 9:35?

"THE WITNESS: It comes from San Diego.

"THE COURT: Now, what is its prior point of departure?

"THE WITNESS: I would have to refer to the scheduling. I think it departs from Oakland again.

"THE COURT: It has been flying all day back and forth?

"THE WITNESS: That is right.

"THE COURT: Between Oakland and—

"THE WITNESS: Not necessarily. Somewhere in our system.

"THE COURT: I see.

"THE WITNESS: That particular airplane that would wind up on this sequence originated in Oakland at 8:15, I believe, Sunday morning, and operated nine or ten trips all day long and then its final departure for the day, leaving Oakland [60] at 10:00 P.M. and into San Diego at 11:55.

"MR. SIEG: I have no further questions.

"THE COURT: All right. Anything further?

"MR. McINNIS: No. Does the court have any further questions?

"THE COURT: Thank you, Mr. Wescott, you may step down.

"(Witness excused.)"

THE COURT: Does that conclude the testimony of Mr. Wescott?

MR. CHRISTOPHER: It does, and I move its incorporation in the present trial record, if that is necessary.

THE COURT: It is in the record now.

MR. CHRISTOPHER: Thank you, your Honor.

THE COURT: Yes.

MR. CHRISTOPHER: We would like, with your permission, your Honor, at this time to offer certain documents. They are documents which are foundational and we believe will expedite the testimony of certain witnesses. We prepared three sets of these documents, your Honor. One set is in the hands of counsel for the defendants and we have a set here to give to the clerk and the plaintiffs have a set for their use.

[61] As the plaintiff and intervening plaintiff's No. 1 for identification, your Honor, we have marked a street map of the San Fernando Valley area. It is an auto club map and has the notation at the bottom "4-70."

This is a map which depicts the Hollywood-Burbank Airport and the surrounding San Fernando Valley area, your Honor.

THE COURT: Any objection?

MR. SIEG: No objection.

THE COURT: Exhibit 1 is ordered in evidence.

(Plaintiffs' Exhibit 1 for identification was received in evidence.)

MR. CHRISTOPHER: Your Honor, we have marked for identification as Exhibit No. 2 a scale drawing which bears the legend "Hollywood-Burbank Airport and Environs", and which shows the runways and the various buildings at Hollywood-Burbank Airport.

This map, this scale drawing, bears the legend "September 1970", so it is right up to date.

I offer that in evidence.

THE COURT: What was the date, again?

MR. CHRISTOPHER: September 1970.

THE COURT: All right.

Any objection?

[62] MR. SIEG: No objection.

THE COURT: Exhibit 2 is ordered in evidence.

(Plaintiffs' Exhibit 2 for identification was received in evidence.)

MR. CHRISTOPHER: As our Exhibit 3, your Honor, we have marked for identification a photograph of the Lockheed Air Terminal as taken on Memorial Day 1930.

Paragraph 6 of the Admitted Facts indicates that the airport was dedicated on that day, Memorial Day 1930, and is a matter of historical interest and shows the conditions at that time.

We have marked this as Exhibit No. 3 and we offer it in evidence, your Honor.

THE COURT: Absent objection, Exhibit 3 is ordered in evidence.

MR. SIEG: No objection.
(Plaintiffs' Exhibit 3 for identification was received in evidence.)

MR. CHRISTOPHER: As our Exhibit No. 4, your Honor, we have marked for identification an order of the Civil Aeronautics Board of the United States of America, bearing Serial No. 745, and the docket number of 507.

This is the order, your Honor, approving the acquisition by Lockheed Aircraft Corporation of what is now [63] Lockheed Air Terminal.

THE COURT: Ordered in evidence, in the absence of objection.

MR. SIEG: Your Honor, this is a new exhibit that I have not previously seen. May I have time to examine it?

THE COURT: Yes.

MR. CHRISTOPHER: Mr. Sieg is correct about that, your Honor. Most of these he reviewed in our office. There will be rare ones, such as this, an official document, which he may not yet have seen.

THE COURT: All right. Why don't you go ahead and at recess the ones he hasn't seen he can look at them. I will withhold ruling on it now and after he has had an opportunity to look at it and examine it we will consider it further.

MR. PACKARD: Could we have it marked for identification, your Honor?

THE COURT: It is marked for identification.

(Plaintiffs' Exhibit 4 was marked for identification.)

MR. CHRISTOPHER: Your Honor, at an appropriate point I would like to call attention to certain paragraphs in these documents. Would you prefer I [64] do it as we go through or would you prefer to wait for a later time?

THE COURT: It doesn't make any difference to me.

MR. CHRISTOPHER: I would like to do it as we go through, your Honor. It is not by way of any argument, but to call the court's attention to certain paragraphs.

THE COURT: All right.

MR. CHRISTOPHER: This is exhibit for identification No. 4.

THE COURT: We had better wait because Mr. Sieg hasn't had an opportunity to examine it.

MR. CHRISTOPHER: All right. We will come back to that one.

THE COURT: Go to the next one.

MR. CHRISTOPHER: Exhibit for identification No. 5 is a license between the FAA and Lockheed Air Terminal, dated April 26, 1951, and which grants the United States certain rights and privileges to install and operate approach lights, instrument landing systems, radar facilities, and other necessary control facilities at the Lockheed Air Terminal.

We offer that in evidence, your Honor.

MR. SIEG: No objection, your Honor.

[65] THE COURT: Exhibit 5 is ordered in evidence.

(Plaintiffs' Exhibit 5 for identification was received in evidence.)

MR. CHRISTOPHER: Exhibit No. 6 for identification, your Honor, is a Supplemental Agreement to the prior exhibit, which bears the date of May 27, 1952; a Supplemental Agreement No. 2 to the prior exhibit, which bears the date of July 24, 1957; a document bearing the date January 4, 1960, which is an amendment of the license which is the prior exhibit; and finally, your Honor, a list of the Government equipment which has been installed at Hollywood-Burbank pursuant to these agreements.

We offer in evidence No. 6, your Honor.

MR. SIEG: No objection.

THE COURT: 6 is ordered in evidence.

(Plaintiffs' Exhibit 6 for identification was received in evidence.)

[66] MR. CHRISTOPHER: Exhibit for identification No. 7, your Honor, are approach and departure charts for use the Hollywood-Burbank Airport.

Identifying them by their names, there is El Monte Seven Departure; Fillmore Three Departure; Saugus Two Departure; Twin Lakes Two Departure; and three approach plates.

MR. SIEG: Your Honor, I would object to this set of exhibits as irrelevant and immaterial. The reception of these in evidence would offer nothing in the way of establishing the plaintiffs' position. Here we are dealing with a flight pattern above the ground, having nothing to do with the activity that is forbidden by the ordinance here in question. I do not believe the record should be encumbered with material of this kind.

THE COURT: What is the purpose, Mr. Christopher?

MR. CHRISTOPHER: Your Honor, the purpose is substantially the same as paragraphs 14 through 27 of the admitted facts. These documents are a strong demonstration for the pervasive federal control of every aspect of operations into and out of Hollywood-Burbank Airport.

Examination, for instance, of the El Monte Seven Departure, which is the top one—at least on my exhibit No. 7 list—indicates how thorough the federal control of [67] the departure is. And these documents are further elucidated in the testimony of witnesses.

THE COURT: Well, I will admit them. I understand it is a problem. And I understand the nature of the objection. And I understand the purpose of your putting them in. As to just how material they are will probably develop.

The nature of the control, as I understand it, though—you are talking about the control by FAA through the tower; that is, the takeoffs and the altitudes, and so forth, and bringing them in, and things of that kind.

MR. CHRISTOPHER: Yes, your Honor.

THE COURT: Now, as to how much that is going to affect your argument as to the ordinance is problematical, in my mind. But I think there is some materiality, so I am going to allow it in.

6 is ordered in evidence. We will get to the argument in more detail later, of course.

MR. CHRISTOPHER: I believe that was 7, your Honor.

THE COURT: 6 there was no objection to.

MR. CHRISTOPHER: That is correct.

THE COURT: All right. I ran out of lead here. All right.

(Plaintiffs' Exhibit 7 for identification was received in evidence.)

[68] MR. CHRISTOPHER: Your Honor Exhibit 8 for identification is the Certificate of Public Convenience and Necessity which has been issued to Air West and which shows its authority to operate at Hollywood-Burbank Airport.

I move its admission.

THE COURT: Ordered in evidence.

MR. SIEG: May I inquire, your Honor? This is No. 8?

THE COURT: 8.

MR. SIEG: The actual certificate, as I see it, unless there has been some change, is issued to Hughes Air Corporation; is that correct?

MR. CHRISTOPHER: Yes. I thank you for that correction, Mr. Sieg. The certificate is to Hughes Air Corporation.

THE COURT: Then it should not be Air West; is that right?

MR. CHRISTOPHER: Yes, your Honor.

THE COURT: It should be to Hughes Air Corporation?

MR. SIEG: No objection.

THE COURT: All right. Now, the same Certificate of Public Convenience, 9, 10, 11, 12, those are all similar documents as applying to different air carriers?

[69] MR. CHRISTOPHER: Yes, your Honor. 12 is the certificate to PSA issued by the PUC.

THE COURT: Yes.

MR. CHRISTOPHER: It has that difference, your Honor.

THE COURT: California Public Utilities Commission?

MR. CHRISTOPHER: Right.

THE COURT: All right.

They are ordered in evidence, 9 through 12.

(Plaintiffs' Exhibits 8 to 12, inclusive, were received in evidence.)

MR. CHRISTOPHER: Exhibit 13 for identification is the Air Carrier Operating Certificate issued by the Federal Aviation Administration to Air West.

I offer that in evidence, your Honor.

THE COURT: Ordered in evidence.

(Plaintiffs' Exhibit 13 for identification was received in evidence.)

THE COURT: We will take our morning recess now, gentlemen, for about ten minutes.

(Recess taken.)

THE COURT: Proceed. We were on 14, I believe.

MR. CHRISTOPHER: Your Honor, 14, 15 and 16 [70] are the Air Carrier Operating Certificates issued to Continental, United and Western.

We offer those in evidence.

THE COURT: Ordered in evidence.

(Plaintiffs' Exhibits 14, 15 and 16 were received in evidence.)

MR. SIEG: No objection.

Do you wish to return to No. 4, your Honor?

THE COURT: Yes, if you are ready, Mr. Sieg.

MR. SIEG: Yes. I have no objection to its admission. I do believe, having now read it, there is a pertinent portion which should be brought to the court's attention.

THE COURT: All right. Well, let's let Mr. Christopher bring the portion he had in mind to our attention, and then you can bring the portion you have in mind. Maybe it will be the same.

4 is ordered in evidence.

(Plaintiffs' Exhibit 4 for identification was received in evidence.)

MR. CHRISTOPHER: Yes, your Honor.

On page 4, your Honor, I would call attention to the next to the last paragraph commencing "Lockheed will cause. . . ." and then the turnover paragraph starting [71] at the bottom of 4 and going over—

THE COURT: May I see it, please?

You said page 4?

MR. CHRISTOPHER: Yes, sir.

MR. PACKARD: Why don't you start at the sentence prior to that?

MR. CHRISTOPHER: All right.

MR. PACKARD: "Lockheed desires . . ."

THE COURT: What is it, now?

MR. CHRISTOPHER: In the middle of the page I call attention, your Honor, to the sentence beginning, "Lockheed desires. . ." and through the bottom of the page and over to the top of page 5.

THE COURT: The paragraph following the quotation right about in the middle of the paragraph, "Lockheed desires to immediately build additional hangar facilities. . . .?"

MR. SIEG: May we go up to the top of the paragraph?

THE COURT: All right.

MR. SIEG: Then I'll be satisfied. "Lockheed plans . . ."

THE COURT: All right. "Lockheed plans to use . . ." All right. Does that go down to the paragraph beginning with "If . . .?"

[72] MR. CHRISTOPHER: Yes, your Honor. That's the portion I wish to invite your attention to.

MR. SIEG: May we continue on with the next paragraph?

THE COURT: All right. Down to the paragraph beginning with "The record shows that . . .?"

MR. SIEG: Yes, your Honor.

THE COURT: This is an application of United Air Lines—wait a minute—for approval of the acquisition by Lockheed of United Air Lines Transport Corporation of the outstanding capital stock of United Air-
port Company of California. Exhibit 4. All right.

MR. CHRISTOPHER: Your Honor, Exhibit 17 for identification is a Commercial Operating Certificate issued by the FAA to PSA.

I offer that in evidence.

THE COURT: 17 is ordered in evidence.

(Plaintiffs' Exhibit 17 for identification was received in evidence.)

MR. CHRISTOPHER: No. 18, your Honor, for identification is the Operations Specifications issued by the Administrator of the FAA to Air West.

THE COURT: Now, we only had the problem—or the change of Air West to Hughes Air Corporation in Exhibit 8, that's the only one that requires a change?

[73] MR. CHRISTOPHER: Yes, your Honor. During the noon hour I will, I think, be able to produce the documents that show the transfer from Hughes to Air West and to fill that minor gap.

THE COURT: All right.

18 is ordered in evidence.

(Plaintiffs' Exhibit 18 for identification was received in evidence.)

MR. CHRISTOPHER: Your Honor, if I may I would like to call attention to certain paragraphs in Exhibit 18.

THE COURT: Very well.

MR. CHRISTOPHER: On the third page, your Honor, which is Part B, page 2, the third page from the front—

THE COURT: Third page from the front?

MR. CHRISTOPHER: Yes, sir. And it is Part B, page 2.

THE COURT: Well, see, I am going beyond the third page. This is Exhibit 18?

MR. CHRISTOPHER: Yes, your Honor.

THE COURT: My third page says Part A, page 3, Operations Specifications.

MR. CHRISTOPHER: I am sorry. It would be the sixth page, your Honor, of yours, I believe.

[74] THE COURT: All right. Yes. Sixth page, Part B, page 2.

MR. CHRISTOPHER: In paragraph 12 I call your attention to the special provision for turbojet aircraft on page 12 requiring them to be—

THE COURT: Paragraph 12?

MR. CHRISTOPHER: Paragraph 12.

THE COURT: Yes.

MR. CHRISTOPHER: Requiring them to be operated in accordance with instrument flight rules.

THE COURT: Yes.

MR. CHRISTOPHER: Now, your Honor, on Part C, page 1, about halfway through the document—

THE COURT: Yes.

MR. CHRISTOPHER: —I call attention to the first sentence of paragraph 22.

THE COURT: "No airport other than the ones listed in Section 32..."?

MR. CHRISTOPHER: Right. Finally, I call attention to Section 32 on page 14 of paragraph C, the reference to Hollywood-Burbank Airport, it being—

THE COURT: Page 14. Yes.

MR. CHRISTOPHER: Paragraph 32, and the reference at the bottom to Burbank Airport as being a regular airport for DC-9 aircraft.

[75] THE COURT: Yes. All right. Well, now, it says, "Type of aircraft." What does this R mean? The R, you say, means regular?

R, regular. Authorized airport. Location. Type of aircraft.

What does the "Type of aircraft"—I don't follow this schedule.

MR. CHRISTOPHER: Your Honor, at the top of the column on the right-hand part of the page you see DC-9 aircraft?

THE COURT: Yes. I see. That's the type. In other words, it is above the printing "Type of aircraft," but not below where the type of aircraft is noted?

MR. CHRISTOPHER: That's correct, your Honor.

THE COURT: All right.

MR. CHRISTOPHER: The R means regular as indicated—

THE COURT: Yes, under paragraph 32.

MR. CHRISTOPHER: Yes, sir.

THE COURT: All right.

MR. CHRISTOPHER: Exhibit 19 for identification is the comparable operations specifications issued to Continental Airlines by the FAA.

THE COURT: 20 and 21 are comparable [76] specifications issued by FAA to United and to Western; is that correct?

MR. CHRISTOPHER: That's correct, your Honor.

THE COURT: You are offering those three?

MR. CHRISTOPHER: Yes, your Honor.

THE COURT: 19, 20, and 21 ordered in evidence.

(Plaintiffs' Exhibits 19, 20 and 21 were received in evidence.)

MR. CHRISTOPHER: Going back to 19, the Continental Operations Specifications, your Honor, on page B, Part 2, which is, I believe, again, the sixth page—

THE COURT: Yes.

MR. CHRISTOPHER: I call your attention to paragraph 12, Special Provisions for Turbojet Aircraft Requiring Them to be Operated in Accordance with Instrument Flight Rules.

THE COURT: All right.

MR. CHRISTOPHER: And on page 16, Part C—

THE COURT: Part C, 16.

MR. CHRISTOPHER: Yes, sir.

THE COURT: Yes.

MR. CHRISTOPHER: Under the listing of California I call attention to Burbank as being one of the [77] listed authorized airports.

Your Honor, in Exhibit 20 the United Air Lines Operations Specifications, I call attention to the last page in that exhibit, which is Part C, page 16, showing Burbank Airport as being an alternate airport.

[78] THE COURT: Very well.

MR. CHRISTOPHER: Your Honor, in Exhibit 21 the comparable reference on the last page to Burbank is an alternate airport for Western Airlines.

Your Honor, Exhibit 22 for identification is the Operations Specifications issued by the FAA to PSA I offer in evidence.

THE COURT: 22 is ordered in evidence.

(The exhibit previously marked Plaintiffs' Exhibit 22 was received in evidence.)

MR. CHRISTOPHER: That one, your Honor, I call attention to the second page of the document you have before you, which is page B-2, and to paragraph 12 on that page, indicating that "Turbojet aircraft must be operated in accordance with the instrument flight rules."

THE COURT: Which paragraph? You said B-2, what paragraph?

MR. CHRISTOPHER: I am sorry. Paragraph 12, your Honor.

THE COURT: Paragraph 12. "be operated within the navigable airspace in accordance with the instrument flight rules."

MR. CHRISTOPHER: That is correct.

THE COURT: All right.

MR. CHRISTOPHER: Your Honor, exhibit for identification, Exhibits 23, 24 and 25 are type certifications [79] issued for the aircraft which are used in the Hollywood-Burbank Airport for the Boeing 727, Boeing 737 and Douglas DC-9. I offer those three exhibits in evidence.

THE COURT: Ordered in evidence.

(The exhibits previously marked Plaintiffs' Exhibits 23, 24 and 25 were received in evidence.)

THE COURT: The PSA, was it 727?

MR. CHRISTOPHER: PSA operates 737 and 727 both.

THE COURT: Both. This 11:30 one, wasn't that 727? Not that it makes too much difference.

MR. CHRISTOPHER: Yes, that is my recollection, your Honor.

THE COURT: All right.

MR. CHRISTOPHER: Exhibit for identification No. 26 is a specimen airworthiness certificate issued by the Administrator of the FAA for a particular DC-9 aircraft that belongs to Air West. That is Aircraft No. N-9338. I move that in evidence, your Honor.

THE COURT: All right. 26 is ordered in evidence.

(The exhibits previously marked Plaintiffs'

Exhibit 26 was received in evidence.)

[80] MR. CHRISTOPHER: Exhibits for identification Nos. 27 and 28 are specimen certificates issued by the FAA for air transport pilots and flight engineers. I offer those in evidence as specimen.

THE COURT: Exhibits 27 and 28 are in evidence.

(The exhibits previously marked Plaintiffs'

Exhibits 27 and 28 were received in evidence.)

MR. CHRISTOPHER: Exhibit No. 29 for identification, your Honor, is the Agreement between Lockheed Air Terminal, Inc., and the FAA for operation of the control tower at Hollywood-Burbank Airport. I offer that in evidence.

THE COURT: Exhibit 29 is ordered in evidence.

(The exhibit previously marked Plaintiffs'

Exhibit 29 was received in evidence.)

MR. CHRISTOPHER: With reference to Exhibit 29, your Honor, I call attention to paragraph 10 on the second page.

THE COURT: Yes. "Control of the control tower by FAA"?

MR. CHRISTOPHER: Yes, sir.

THE COURT: All right.

[81] MR. CHRISTOPHER: Finally, your Honor, in this particular set, Exhibit 30 for identification is the presently existing informal runway use, noise abatement order, issued by the FAA for use at Hollywood-Burbank Airport. The present document is No. 7100.5B, and in that same exhibit, your Honor, are the three preceding FAA orders.

Taken in order, your Honor, there is the first order of December 7, 1967, which has the designation BUR 7100.3.

THE COURT: What is the "BUR" an abbreviation for?

MR. CHRISTOPHER: Burbank.

THE COURT: Burbank. All right.

MR. CHRISTOPHER: The second one of this group, April 23, 1968, bearing designation BUR 7100.5.

THE COURT: Are you talking about portions of Exhibit 30?

MR. CHRISTOPHER: Yes, sir.

THE COURT: It is described here in my list—it would indicate to me there was only one order involved, that being 7100.5B.

MR. CHRISTOPHER: I apologize for that, your Honor. We found the preceding orders and we thought to make the record complete to put in not only the presently [82] effective one, but the preceding ones.

THE COURT: How many preceding ones are there?

MR. CHRISTOPHER: Three.

THE COURT: Three. I will make a note here.

MR. CHRISTOPHER: The second one of the set is April 23, 1968, bearing designation BUR 7100.5.

The third one is dated August 19, 1968, bearing the designation BUR 7100.5A, and finally the current one bearing the date September 4, 1969, and bearing the designation BUR 7100.5B.

We offer those in evidence, your Honor.

THE COURT: Very well. Ordered in evidence as Exhibit 30.

(The exhibit previously marked Plaintiffs' Exhibit 30 was received in evidence.)

MR. CHRISTOPHER: With respect to these documents, your Honor, and taking the current one which is dated 4 September 1969, bearing the designation BUR 7100.5B, calling particular attention to the paragraph 5 and subparagraph C.

THE COURT: Yes.

MR. CHRISTOPHER: That provides—

THE COURT: C, did you say?

MR. CHRISTOPHER: Yes, on the second page.

THE COURT: Yes.

[83] MR. CHRISTOPHER: That provides that Runway 25 is a preferential runway during the hours from 11:00 p.m. to 7:00 a.m.

The arrow in front of that, your Honor, indicates that that is an added paragraph, which was not in the preceding order as the reference to the preceding order would indicate.

THE COURT: That was a noise abatement measure, was it?

MR. CHRISTOPHER: Yes, your Honor. The order as a whole is the FAA—

THE COURT: Yes, that is a part of it.

MR. CHRISTOPHER: Yes, sir.

THE COURT: All right.

MR. CHRISTOPHER: And was expressly ordered, as that paragraph shows, to cover the hours between 11:00 p.m. and 7:00 a.m.

THE COURT: All right.

MR. CHRISTOPHER: Exhibit 31 for identification, your Honor, is a sectional aeronautical chart for the Los Angeles area, dated February 5, 1970.

Your Honor, your notation there may show charts for San Francisco, Las Vegas and Phoenix as well.

THE COURT: My notation just shows Los Angeles.

MR. CHRISTOPHER: Good. We offer this in [84] evidence, your Honor.

THE COURT: Ordered in evidence.

(The exhibit previously marked Plaintiffs' Exhibit 31 was received in evidence.)

MR. CHRISTOPHER: Exhibit for identification No. 32 is the document dated October 1, 1969, bearing the title, "Facility Management" and the pages are—the heading page is 7210.3, and pages 129, 130, 131, 132, 197 and 198. These are offered in evidence, your Honor.

THE COURT: What were those pages, again, please, Mr. Christopher?

MR. CHRISTOPHER: Your Honor, I was just simply listing all the pages of the exhibit.

THE COURT: Oh, I see. You are not citing anything in particular?

MR. CHRISTOPHER: I was going to now, your Honor.

THE COURT: Very well.

MR. CHRISTOPHER: The page to which I would invite your attention is page 129, and in particular there I would call attention to paragraph which is designated 1140 and 1141, headed, "Types of Flow Control and Action" by Affected Centers Respectively.

THE COURT: Very well.

MR. CHRISTOPHER: Exhibit for identification [85] No. 33, your Honor, is the Central Flow Control Order, being Order No. 7230.12, which I offer in evidence.

THE COURT: How is that generally to be distinguished from 32, which is designated just "Flow Control"?

MR. CHRISTOPHER: Your Honor, flow control is accomplished by the regional or local air traffic control centers. Flow control might be instituted by the Los Angeles Center at Palmdale, pursuant to the provisions of Exhibit 32.

Exhibit 33 is a new order, providing for a centralized flow control, a Washington, D.C., system facility which attempts to coordinate flow control throughout the entire air traffic system.

THE COURT: Under the central flow control, that order—the control is from Washington, you say?

MR. CHRISTOPHER: Anticipating the testimony somewhat, your Honor, what happens is if the Los Angeles Center at Palmdale wishes to institute flow control on a flight leaving from Burbank to San Francisco, for example, before they institute that flow control and order a plane to be held at the airport of Hollywood-Burbank, they would be required to report their intention to Washington, D.C.

[86] THE COURT: I see.

MR. CHRISTOPHER: And get authorization or approval from the centralized flow control center.

THE COURT: All right. 33 is ordered in evidence.

(The exhibits previously marked Plaintiffs' Exhibits 32 and 33 were received in evidence.)

MR. CHRISTOPHER: Your Honor, on the point of your question, if I may call attention in Exhibit 33 to paragraph 6-A-1, bottom of the page—

THE COURT: All right.

MR. CHRISTOPHER: —and the sentence reading “CFCF” meaning Central Flow Control Facility—“shall: Manage the flow of air traffic throughout the ATC system to minimize en route delays and achieve the maximum utilization of the airspace.”

THE COURT: Yes.

MR. CHRISTOPHER: And continuing. And also subparagraph (2), “CFCF shall: Concur or indicate non-concurrence in proposed flow control restrictions by the ARTCCs”—which is the Air Route Traffic Control Centers—“unless mutually agreed alternative measures are coordinated with the affected center.”

THE COURT: Well, I suppose I will have to wait for the evidence, but is there any controversy as to just [87] what flow control is? Is flow control the scheduling of flights, generally speaking?

Maybe we better wait for the evidence.

MR. CHRISTOPHER: Well, I can—

THE COURT: As these matters come in, if it is not in controversy, why—

MR. CHRISTOPHER: I think, without anticipating the evidence, your Honor, I could take you back, if I may, to Exhibit 32 and—

THE COURT: 32. Yes.

MR. CHRISTOPHER: —invite your attention to the page which is marked page 129 and the subparagraph which is numbered 1141 which in subparagraphs A, B and C indicates the type of action which may be taken by the Los Angeles Center to establish a flow control on aircraft leaving on specified routes.

THE COURT: So far as the flight is concerned it says limiting the number of departures in a given time period.

MR. CHRISTOPHER: Yes, your Honor.

THE COURT: That's C.

MR. CHRISTOPHER: Yes, your Honor. Or B, "Establish certain amount of separation either in terms of miles or minutes between aircraft."

THE COURT: Time or altitude or distance?

[88] **MR. CHRISTOPHER:** Right. Or subparagraph A there, "Clearing the aircraft on specified routes."

THE COURT: This is the flow control of the local station as such which has to be, you say, approved by the Washington office, the central flow control?

MR. CHRISTOPHER: Yes, your Honor.

THE COURT: All right.

MR. CHRISTOPHER: Exhibits 34 and 35, your Honor, which should, perhaps, be taken together, are the initial decision of the hearing examiner in Pacific Northwest-California investigation conducted by the Civil Aeronautics Board, Docket No. 18884. And 35 is the action of the Civil Aeronautics Board itself in that same investigation, Docket No. 18884 dated May 12, 1970.

The other was the order on reconsideration dated July 10, 1970.

THE COURT: How does this—excuse me.

MR. CHRISTOPHER: These two decisions, the initial decision of the hearing examiner and the decision of the Civil Aeronautics Board, award additional and new service to Hollywood-Burbank Airport to Continental Airlines. They spell out the use of Hollywood-

Burbank Airport as a satellite airport relieving congestion at Los Angeles International Airport by providing direct service from the San Fernando Valley area to Pacific Northwest as well as Northern [89] California cities.

I offer those in evidence, your Honor.

THE COURT: All right. 34 and 35 are ordered in evidence.

(The exhibits previously marked Plaintiffs' Exhibits 34 and 35 were received in evidence.)

MR. CHRISTOPHER: If I may, I'd like to invite the court's attention to certain pages in the examiner's decision.

THE COURT: 34?

MR. CHRISTOPHER: 34, your Honor. I first call attention, invite attention to page 3, which is farther along than you would expect page 3 to be, and the little paragraph there beginning "Of especial significance..."

THE COURT: Yes.

MR. CHRISTOPHER: That entire paragraph, your Honor.

THE COURT: All right.

MR. CHRISTOPHER: Your Honor, I invite attention on page 4 to the paragraph beginning "The changes brought..." and so forth and continued over to the top line of page 5.

THE COURT: All right. The paragraph ending at the top of page 5?

MR. CHRISTOPHER: Yes, your Honor.

[90] And finally as to the hearing examiner's decision on page 33 I invite your Honor's attention to the middle of the paragraph commencing "Apart from..."

THE COURT: All right.

MR. CHRISTOPHER: Turning now to Exhibit 35

THE COURT: Does the reconsidered order affect any of these matters you have pointed out to me?

MR. CHRISTOPHER: No, your Honor.

THE COURT: All right. 35.

MR. CHRISTOPHER: I call attention first to—

THE COURT: Let's see. So there is no confusion here, 35—I find two documents in 35.

MR. CHRISTOPHER: Yes, your Honor.

THE COURT: They are both orders of the Civil Aeronautics Board. One order is No. 70-5-52, the other is 70-7-49. All right. Then the document numbers are the same?

MR. CHRISTOPHER: One is the basic order and the other is the order on reconsideration, your Honor.

THE COURT: Yes. One is dated July 10, 1970?

MR. CHRISTOPHER: That is the order on reconsideration.

THE COURT: That's the reconsideration. And the other order is dated May 12, 1970, which would be the [91] original order?

MR. CHRISTOPHER: Right, your Honor.

THE COURT: Yes. Any reference?

MR. CHRISTOPHER: Yes, your Honor.

THE COURT: Reconsideration, now, we are talking about?

MR. CHRISTOPHER: No. I am talking about the basic decision.

THE COURT: Yes.

MR. CHRISTOPHER: On page 6 I call attention to the sentence beginning, near the bottom of the page, "The most significant deficiency . . .," three lines up from the bottom, your Honor.

THE COURT: Yes. "The most significant deficiency, in our view . . .?"

MR. CHRISTOPHER: And over to the end of that paragraph on the top of the next page.

THE COURT: Yes.

MR. CHRISTOPHER: That is, your Honor, the only paragraph to which I call special attention.

THE COURT: Nothing in the reconsideration?

MR. CHRISTOPHER: No, your Honor. Just the portion I have called to your attention.

THE COURT: Very well.

MR. CHRISTOPHER: Your Honor, Exhibit for [92] identification 36 is a letter dated December 14, 1957, from the Mayor of Burbank to the Civil Aeronautics Board.

THE COURT: Ordered in evidence.

(The exhibit previously marked Plaintiffs' Exhibit 36 was received in evidence.)

[93] **MR. CHRISTOPHER:** I call attention to the second paragraph on page 1.

THE COURT: Very well.

MR. CHRISTOPHER: Exhibit for identification 37, your Honor, is the 1968 Annual Report of CAB, pages 14 and 15. I offer it in evidence, your Honor.

THE COURT: Ordered in evidence.

(Plaintiffs' Exhibit 37 for identification was received in evidence.)

MR. CHRISTOPHER: I invite the court's attention to the two paragraphs on page 14 under the heading "Airport Congestion".

THE COURT: Let's see, page 14, under "Airport Congestion".

MR. CHRISTOPHER: The first two paragraphs, your Honor.

THE COURT: Yes. This is 37. I have it. Those two paragraphs on page 14.

MR. CHRISTOPHER: Thank you.

Exhibit for identification No. 38 is the 1969 Annual Report, pages 13 and 14, which I offer in evidence.

THE COURT: Ordered in evidence.
(Plaintiffs' Exhibit 38 for identification was received in evidence.)

[94] **MR. CHRISTOPHER:** And again I invite the court's attention to a paragraph under the heading "Airport Congestion", this time appearing on page 13.

THE COURT: Yes.

MR. CHRISTOPHER: Exhibits for identification Nos. 39 and 40 are respectively resolutions numbered 14,506 of the Burbank City Council adopted April 18, 1967, and Resolution No. 15,190 of the Burbank City Council adopted May 13, 1969.

THE COURT: Concerning?

MR. CHRISTOPHER: The first one, your Honor, concerns the resolution requesting the CAB to authorize service by Pacific Airlines out of Hollywood-Burbank Airport, and the second resolution urges to the California PUC to approve certain service between Hollywood-Burbank Airport and other air terminals.

I offer those two in evidence. I handled them together only for purposes of expedition.

THE COURT: Exhibits 39 and 40 are ordered in evidence.

(Plaintiffs' Exhibits 39 and 40 were received in evidence.)

MR. CHRISTOPHER: 39, your Honor, I invite your attention to the third and fourth "Whereas" clause, indicating the availability of Lockheed Air Terminal

to [95] three million people and, conversely, the congestion and inconvenience at Los Angeles International.

On Exhibit No. 40, your Honor, I invite your attention to the fourth and fifth "Whereas" clauses.

THE COURT: Very well.

MR. CHRISTOPHER: For identification Exhibit No. 41 is a letter dated August 2, 1966, from the Mayor of Burbank to the Chairman of the Civil Aeronautics Board, and I offer that exhibit in evidence.

THE COURT: Exhibit 41 ordered in evidence.

(Plaintiffs' Exhibit 41 for identification was received in evidence.)

THE COURT: What is the date?

MR. CHRISTOPHER: August 2, 1966, your Honor.

THE COURT: All right.

MR. CHRISTOPHER: Your Honor, Exhibits 42 through 46 are flight schedules of Continental Airlines, Air West, PSA, United, and Western.

The Continental schedule contains in its folder announcement of the new service which was authorized by the CAB order which came in as Exhibit No. 35.

The Air West and PSA schedules show service at Hollywood-Burbank Airport.

The United and Western schedules show service [96] from Los Angeles, which would use Hollywood-Burbank as an alternate, under the Operations Specifications for those airlines, to which we earlier referred.

I offer Exhibits 42 through 46 in evidence.

THE COURT: Exhibits 42 through 46 ordered in evidence.

(Plaintiffs' Exhibits 42 to 46, inclusive, were received in evidence.)

MR. CHRISTOPHER: I have come to a breaking point, your Honor.

THE COURT: It is 12:00 o'clock, so we will take our noon recess until 1:30, gentlemen.

MR. CHRISTOPHER: Thank you, your Honor.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 1:30 o'clock p.m. of the same day.)

[100] **LOS ANGELES, CALIFORNIA, TUESDAY, SEPTEMBER 15, 1970, 1:30 P.M.**

THE COURT: Very well, gentlemen.

Let's see, we're down to Exhibit 47, was it? Mr. Christopher.

MR. CHRISTOPHER: Yes, your Honor. To conserve time I might attempt to take the next four documents, your Honor, 47, 48, 49 and 50 for identification, all relating to the Federal Aviation Agency's high density traffic rules.

47 is the notice of proposed rule making dated September 3, 1968.

Exhibit for identification No. 48 is the special air traffic rule itself relating to the high density traffic airports.

THE COURT: All right.

MR. CHRISTOPHER: Your Honor, pardon me.

THE COURT: They are all rules, but different dates.

MR. CHRISTOPHER: Yes, your Honor.

49 is the high density amendment dated February 24, 1969.

50 is a further amendment dated December 22, 1969, keeping in effect the high density rule.

THE COURT: Yes.

[101] **MR. CHRISTOPHER:** I offer all four exhibits, your Honor.

THE COURT: 47 to 50 ordered in evidence.

(The exhibits previously marked Plaintiff's Exhibits 47 to 50 were received in evidence.)

MR. CHRISTOPHER: Looking first at Exhibit 47, your Honor, may I invite your attention to the first four paragraphs on page 12581.

THE COURT: On page 12581. All right. The first four paragraphs.

MR. CHRISTOPHER: On Exhibit No. 48, your Honor, on the first page, which is 17896, may I invite your attention to the paragraph in the third column commencing with "In regard to some of the comments..." and extending to the end of that column. And in particular, your Honor, to the first paragraph which indicates that the high density rule was intended as an efficiency measure rather than being intended to correct the safety problem.

THE COURT: Yes. I remember I read the stipulation. In those airports involved under the regulation the FAA moved into the scheduling of flights.

MR. CHRISTOPHER: That's correct, your Honor.

THE COURT: All right.

MR. CHRISTOPHER: Now, with your Honor's permission I'd like to correct an oversight which became [102] apparent this morning, and add, with the agreement of the court, to Exhibit No. 8 an order of the FAA permitting Hughes Aircraft Corporation to use the tradename Air West. That corrects and completes Exhibit No. 8.

Is that agreeable to you, Mr. Sieg?

THE COURT: Any objection?

MR. SIEG: No objection.

THE COURT: All right. How shall I describe it? This is an order dated June 15, 1970, of the Civil

Aeronautics Board on the application of Hughes Aircraft Corporation, and it is being made a part of Exhibit 8. Very well.

MR. CHRISTOPHER: Your Honor, I am going to pass Exhibit No. 51 as being more appropriately explained during testimony of the witness from Continental Airlines and then take two exhibits together, Exhibit Nos. 52 and 53.

Exhibits numbered 52 and 53 for identification are an affidavit of Frank A. Decker, who is general operations manager of Official Airline Guide. That's Exhibit 53.

Exhibit 52 for identification is the list of scheduled departures of jet aircraft for domestic carriers for one day in May, the 4th and 5th of May, 1970, between 11:00 p.m. and 7:00 a.m.; an IBM run showing the number of jet departures from each of the airports in which each scheduled airline operates for that day in May, together [103] with—

THE COURT: Excuse me. Did the listing show the day of the week involved?

MR. CHRISTOPHER: Your Honor, that is Monday night and Tuesday morning. The reason that day was selected is because May 4th is the day that the ordinance became effective.

THE COURT: I see. Monday is the 4th of May and Tuesday is the 5th.

MR. CHRISTOPHER: That's right, your Honor. The affidavit of Mr. Decker describes how this compilation was made, I think it is self-explanatory as to the way the print-out, computer run was made and how the tabulation of 1,009 scheduled jet departures during the hours between 11:00 p.m. on May 4th and 6:59 a.m. on May 5th was computed.

We offer these in evidence, your Honor.

THE COURT: Any objection to this affidavit? You are offering that affidavit—you mean the testimony of Mr. Decker?

MR. CHRISTOPHER: To explain the exhibit.

THE COURT: Any objection?

MR. SIEG: No, no objection, your Honor.

THE COURT: Very well. 52 and 53 ordered in evidence.

(The exhibits previously marked Plaintiffs' Exhibits 52 and 53 were received in evidence.)

[104] **MR. CHRISTOPHER:** Then for the final exhibit—

MR. SIEG: While we are on that particular point, would you mind just for my benefit and possibly the court's identify the letters for the Hollywood-Burbank Airport?

THE COURT: Identify the letters?

MR. SIEG: Yes. That are used in the left-hand column of Exhibit 52—

MR. CHRISTOPHER: I will do one better than that, so that it is clear to the court and counsel, and they will have a guide for all of these.

If you will look at Mr. Decker's affidavit, as an exhibit to that affidavit is an identification for each of the airports involved. The letters BUR are the identification letters for the Hollywood-Burbank Airport.

THE COURT: How many did you say were involved?

MR. CHRISTOPHER: Your Honor, there are 1,009 flights during this 8-hour period. That is jet departures of regularly scheduled aircraft.

THE COURT: As I understand it, these are identification letters of airports.

MR. CHRISTOPHER: That is correct, your Honor.

[105] THE COURT: All right. How many airports are involved in those 1,009 flights? With many of them there were no flights. I can see it shows two in one and zero. Many of the airports listed here there were no flights during that period of time; many of them.

MR. CHRISTOPHER: I don't believe I will be able to answer that question without making a computation. I will do that before the end of the day.

THE COURT: All right.

Is each airport different? Every airport involved here?

MR. CHRISTOPHER: This is a listing of all the airports.

THE COURT: 1,009 airports.

MR. CHRISTOPHER: No, sir. 1,009 flights, your Honor.

THE COURT: That is right, flights.

MR. CHRISTOPHER: 1,009 takeoffs.

THE COURT: I don't think it would be difficult to get the number, because I think there is about the same number of airports listed on each page.

MR. CHRISTOPHER: We will have that for you before the end of the day.

THE COURT: All right.

MR. CHRISTOPHER: As the affidavit of Mr. [106] Decker shows, what they did was to make a computer run of all of the airports which are listed from time to time in the official airline guide, to determine whether or not they had any flights during the so-called curfew hours.

THE COURT: Yes.

MR. CHRISTOPHER: And that produced the total number of flights, and as you observed it produced

the indication that a number of the airports had no flights during those hours.

The listings here, though, would be a comprehensive list of every airport from which federally certificated scheduled air carriers operated within the United States.

Mr. Sieg, did I answer your question adequately?

MR. SIEG: You haven't given me the letters—

MR. CHRISTOPHER: BUR.

THE COURT: It should be only one, shouldn't it?

MR. SIEG: Do you happen to have the page where the letters appear?

MR. CHRISTOPHER: They appear on page 0005 and it indicates zero rather than 1, your Honor, because of the one flight being a PSA flight, which is—

[108] MR. CHRISTOPHER: The case was filed, I believe, about the 14th of May.

THE COURT: We had a hearing on the 27th, I believe.

THE CLERK: Yes.

THE COURT: And then the hearing on the preliminary injunction was thereafter.

THE CLERK: The hearing was on the 27th.

MR. CHRISTOPHER: The temporary restraining order appears to have been issued on the 15th of May.

THE COURT: Yes, and the hearing on the preliminary was on the 27th.

MR. CHRISTOPHER: Right, your Honor.

THE COURT: All right.

MR. CHRISTOPHER: The final exhibit to be offered at this time, your Honor, is another affidavit about which we have spoken to Mr. Sieg, an affidavit of Richard S. Shreve, who is Manager of the Cargo Services Administration of Air Transport Association of America. This is Exhibit for identification No. 54.

This affidavit reports that Mr. Shreve conducted a study to determine the amount of United States airmail transported by the certificated air carriers at four Airports: JFK, Los Angeles International, O'Hare and Atlanta during a one-week period during the so-called curfew hours and non-curfew hours.

[109] The affidavit shows that the result of the study indicates that for those four airports 48.21 percent of all airmail moved between the hours of 2300 and 0659 in the morning, so-called curfew hours.

We offer this affidavit in evidence in lieu of the testimony of Mr. Shreve.

MR. SIEG: May I inquire of Mr. Dau, is this affidavit—was it shown to me?

MR. DAU: No, I showed you the records on which it was based and that was one of the affidavits I pointed out to you this morning—

MR. SIEG: That you were adding.

MR. DAU: —that would contain a compilation of that information, rather than the voluminous documents.

MR. SIEG: As I recall, you showed me a document of some proportion.

MR. CHRISTOPHER: Yes, Mr. Sieg, that document is here in court for your inspection and the court's.

I also would like to make it clear that if you would like to have further time with respect to this affidavit you are welcome to inspect it at the next recess.

MR. SIEG: You have indicated I had agreed to this and I am not sure I have, in the context you have this document.

MR. CHRISTOPHER: If I indicated that, I [110] mispoke, Mr. Sieg. I thought it had been discussed with you.

I know you had not agreed with it.

MR. SIEG: All I can say is this is the first time I have seen the affidavit and I haven't had a chance—

THE COURT: You want to withhold offering it for the time being?

MR. CHRISTOPHER: Yes, your Honor, I will simply have it marked for identification and we will discuss it with Mr. Sieg if he has time during the recess.

THE COURT: Very well.

MR. PACKARD: Your Honor, we will call at this time Mr. David Simmons.

DAVID M. SIMMONS, called as a witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated.

Would you state your name, please.

THE WITNESS: David M. Simmons.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. PACKARD:

Q Mr. Simmons, where do you presently reside?

A I reside at 729 North Camden Drive, Beverly [111] Hills, California.

Q By whom are you presently employed?

A By Lockheed Air Terminal, Inc.

Q For what period of time have you been employed by Lockheed Air Terminal, Inc.?

A Since October of 1946.

Q And in October 1946 you were first employed by Lockheed Air Terminal, Inc., in what capacity were you employed?

A I was employed originally in the accounting department.

Q What is your present capacity at Lockheed Air Terminal, Inc., as of this date?

A I am the president and also a director of Lockheed Air Terminal.

Q Have you been consistently employed then since October 1946 by Lockheed Air Terminal, Inc.?

A Yes.

Q Would you please relate for us, generally speaking, what your responsibilities and duties are as president of Lockheed Air Terminal, Inc.?

A As chief executive officer I have the general and active control over the business affairs and the activities of the company.

This would extend, of course, to the management [112] and operation of the Hollywood-Burbank Airport.

Q Is that one of your primary duties?

A The Hollywood-Burbank Airport?

Q Yes.

A It is, I would say, a primary duty.

Q Now, when you were initially employed in the accounting department, what were your duties? Would you please relate to the court your duties that you had at your initial employment, up to the present date.

A After about two years in the accounting department in 1949 I transferred to the operational phase of operations, airport operations.

This included negotiations of airline leases, contract administration, surveillance of the physical aspects of the airport.

I had a succession of titles in the operational phase leading up to 1956 when I was elected corporate secretary and operations administrator. At that point I had responsibilities over the operational phases of the field,

including, as I have stated before, the maintenance, et cetera.

[113] Q Prior to being employed by Lockheed Air Terminal, Inc., in 1946, had you been in any manner connected with the aviation industry, sir?

A Yes, I had been employed by Douglas Aircraft from the period 1939 to 1944. My initial employment at Douglas was in the material division.

In 1942 I was transferred overseas to assist in the construction of an air base in East Africa which Douglas had constructed—or was reconstructing under an Air Force contract.

Q From 1944 to 1946 were you in the Navy?

A I returned to the states in '44. I entered military service. I was a naval officer from '44 until '46.

My experience there was largely in connection with air stations. I participated in the reconstruction of the airport on Wake Island following the end of hostilities.

Q At the present time are you a member of any community or civic organizations?

A Well, I am a member of the Burbank Chamber of Commerce. I held a succession of titles with the Burbank Chamber. In 1947 I was president of the Chamber. 1967. I want to correct that.

Q And you were president of the Chamber of Commerce of Burbank?

[114] A Yes.

Q Now, could you describe for us generally the location of the Hollywood-Burbank Airport?

A The airport is located in the easterly portion of the San Fernando Valley. I would describe that as in the northerly portion of what we refer to as the L.A. Basin area, the L.A. Metropolitan area.

MR. PACKARD: I think we have marked here as Exhibit No. 1 a map. I would like to refer—may I approach the witness, your Honor?

THE COURT: Yes. If that map is large enough do you want to put it up?

MR. PACKARD: Yes, I think maybe that would be fine. Possibly, your Honor, in here would be fine (indicating).

THE COURT: Fine. Can everybody see it? Just so everyone can see it.

MR. PACKARD: I think, your Honor, this is a copy, our copy, of Exhibit No. 1.
Can you see it, your Honor?

THE COURT: Yes, I can see it.

MR. PACKARD: Maybe you can use the pointer here.

Q Will you point out—is it true that the pink color—the City of Burbank is portrayed on Exhibit No. [115] 1?

A Yes.

THE COURT: You can step down there if you want to.

THE WITNESS: Yes. That would be the City of Burbank.

BY MR. PACKARD:

Q I notice up at the top here this has an Automobile Club of Southern California at the top. That is a compass rose showing north, east, south and west; is that correct, sir?

A That is correct. North is on this.

Q Is it at the top?

A On the vertical axis.

Q Then on this Exhibit No. 1 does it show the Lockheed Burbank Terminal?

A The Lockheed Burbank Terminal is shown in what I would describe as the northwesterly portion of the pink shaded zone, which is the City of Burbank.

THE COURT: Is it outlined? Is there an outline there of the airport?

MR. PACKARD: You answer it.

THE COURT: To me from here it looks like it is outlined. It is outlined?

THE WITNESS: No, it isn't, your Honor. [116] Actually the pink designation portrays the City of Burbank property. The airport itself extends upward into this triangle immediately north which is not designated in pink.

THE COURT: I see.

MR. PACKARD: I am going to ask the witness with this red—I will tell you, rather than the red, give me a blue.

THE COURT: Here is a black grease pencil if you want.

MR. PACKARD: Fine. Thank you.

Q I am going to ask that with this black pencil you outline the Lockheed Air Terminal, Burbank Lockheed Air Terminal with the black. Just go around the boundary, Mr. Simmons, please, and just take your time. Make sure before you start marking.

(Witness marks on map.)

BY MR. PACKARD:

Q This is Tujunga right here (indicating)?

A This map is rather small. But in this area the border is somewhat checkered. There are third party ownerships in there. That—

THE COURT: It's not a smooth line, then?

THE WITNESS: Cannot be fined in this scale.

MR. PACKARD: That's the northeast corner.

THE COURT: All right. I see.

[117] Is there a highway that runs along the northeast corner there?

THE WITNESS: The San Fernando Road.

THE COURT: Yes.

THE WITNESS: Plus the Southern Pacific Railroad right-of-way.

THE COURT: I see your outline. All right. Go ahead.

MR. PACKARD: Your Honor, possibly after we finish here we can substitute this one for the one that is in evidence. Because he is marking on our copy.

THE COURT: I see. This is not the one in evidence. Is it the same?

MR. PACKARD: It's the same. So maybe with that understanding—fine.

Q Now, is part of the facility itself in the City of Los Angeles?

A That is correct.

Q I see. What portion is that?

A The aviation zone.

Q What do you mean by the aviation zone?

A This is a clear zone on the west side of Vineland Boulevard which is kept clear of all obstructions leading into Runway 7, the instrument runway.

Also the northerly portion of Runway 15 and the [118] contiguous taxiway areas and the land areas.

Q Now, you refer to a runway as Runway 7. Would you just put down a line and then put 7 from that runway so that we will know what you are referring to when you say Runway—just a line down and then put 7. All right.

Then I think you also—to clarify the record here, when you use the term 7, that's when you are heading or landing in an easterly direction; is that right?

A That is correct. I think that was very clearly defined in the previous testimony.

THE COURT: Yes. From west to east.

THE WITNESS: Compass heading of 70 degrees.
BY MR. PACKARD:

Q So if you turn around it would be 250 going the other direction, the same runway?

A Yes.

Q When we talk about Runway 25 or Runway 7, we are talking about the same runway only heading in different directions?

A That is correct.

Q Then you referred to Runway 15; is that correct?

A Yes.

Q Will you please mark that out? On Runway 7 you have indicated there is navigational aids which includes [119] an ILS; is that correct?

A That is correct. Runway 7 has been designated by the Federal Aviation Agency as our instrument runway.

THE COURT: What is the degree on 15? You gave me the degree on—

THE WITNESS: 15 is actually 150 degrees.

THE COURT: 15?

THE WITNESS: 15 is 150. The runways take their designation in terms of their compass headings.

THE COURT: Well, I thought you said 25 was 150.

THE WITNESS: No. Runway 25 would be a compass heading of 250.

MR. PACKARD: I think, your Honor, to clarify it so we understand, I think whenever a runway is given if you just add a zero—

THE COURT: I understand. But I didn't get the compass heading of 15.

THE WITNESS: 150.

THE COURT: Wait a minute. I am sorry. Oh, yes. 15. 7 is 70. 25. Plus 180, 250. 15 is what?

THE WITNESS: 150.

THE COURT: 150.

THE WITNESS: Would it help if I designate [120] the compass heading right along with the—

THE COURT: If you designate the runway by your marking, why, it will help pretty well.

MR. PACKARD: All right.

THE COURT: When we get 33, is that 330?

MR. PACKARD: Just to clarify the record—there has been some confusion. I think, your Honor, any time a runway is referred to as 33 or 15 or 7, if you just add a zero that's a magnetic heading of that particular runway whether it's Burbank or any place in the country.

THE COURT: I see.

MR. PACKARD: That's my understanding. If you just add a zero.

THE COURT: It would be 330, because you would add the 180. All right. I understand now.

MR. PACKARD: 180 is just the reverse direction. So you add 180 and that gives you—

THE COURT: That's the way they get the numbers, I guess.

MR. PACKARD: Yes.

Q I show you, I believe, what has been marked here in evidence as Exhibit 3 which is a photograph of the field when it was dedicated on May the 30th, 1930. Do you see that, sir?

A Yes, I do.

[121] Q And does that truly depict the condition that existed at the time of the dedication of the field?

A Yes, it did. It very clearly shows the predominant amount of the taxiways, hangars and other field facilities.

Q Did you happen to be present on May the 30th, 1930, when the airport was dedicated?

A Yes, I was present with my father. My father was a sportsman pilot and was quite interested in the development of the field. It was known as the first million-dollar airport in the United States. So I joined him. We flew out to the airport and observed the dedication ceremony.

Q Were there any particular features which made this particular site a particularly suitable site for an airport?

A It is my understanding that the developers of the airport were encouraged by some surveys that indicated that the San Fernando Valley is relatively fog-free as compared to the other areas of the city; there was an availability of land. While it was convenient to the L.A. metropolitan area there was not a proximity of population to the airport at the time it was developed.

Q Now, could you relate for us to the best of your knowledge some of the highlights of the development and [122] growth of the Lockheed Airport?

A Yes. Following the dedication the development of the field was rather dramatic in a sense. By 1934 it had been acquired by a subsidiary of what is currently United Air Lines. And a number of major air carriers operating into the L. A. metropolitan area began relocating flights into that area. By 1946 it became a predominant airport in the L. A. metropolitan area.

Prior to 1946, however, it was acquired by Lockheed Aircraft Corporation in 1940, and at that time Lockheed was engaged in the production of military

aircraft, the military aircraft of the type that needed larger facilities, larger airport facilities, and factory facilities. The airport, following the acquisition—the United States Government recognizing the importance of this war production acquired adjacent land and participated in the extension of the runways at Government cost. As a matter of fact, in this period around '42, '43, with the acquisition of the additional lands the airport assumed its approximate configuration which I have delineated with minor changes.

Q Did the Government install any portions of runway lighting or facilities?

A Yes. The Government installed the major portion of the runways, taxiways, the airport runway lighting [123] ing and also provided what I would call navigation lights to assist in the alignment of aircraft coming in on a runway.

Q Does the Government still own any portion of land surrounding the airport?

A Yes, the Government owns approximately 128 acres of—23 acres is leased to Lockheed Aircraft Corporation for the plant site. There is something over 100 acres that underlie what we call the runway extension, those Runways 15 and 7.

Q What do you mean exactly when you say underlies the runway extension?

A The runways are located on land owned by the Government.

Q And is that land within the City of Burbank?

A Partially so. The land situated on the west side of the airport underlying Runway 7 is in the City of Burbank. The Government ownership in the northerly part of the airport underlying Runway 15 is in the City of Los Angeles.

Q Now, would you relate for us somewhat the history of the growth of commercial airline traffic that was serviced by Lockheed Burbank Airport, say, from 1946—through 1946 to the present date? I mean has it been a consistent growth, or what transpired?

[124] A No. I believe it can be characterized as saying we have had our ups and downs. In 1946 I mentioned that the major airlines were operating all flights into the Hollywood-Burbank Airport. We had 1,200,000 passengers that year, 82,000 commercial flights, commercial movements.

In October of that year the major airlines moved to what was then called L. A. Municipal Airport, which is Los Angeles International. It was renamed.

In 1947, the following year, traffic dropped to 175,000 passengers. While that was a disappointing trend for us certainly we did have a couple of things happen that year that were encouraging. Both the Flying Tiger Freight Line and Slick Airways moved their main office and maintenance bases to Burbank.

Shortly thereafter the supplemental air carriers began operating at the Lockheed Air Terminal. There were facilities available and these were innovative small airlines that developed after the War. They were the first to offer the coach type air fare which was roughly half the cost of the first-class air travel that had been offered to the public heretofore. So the public was rather quick to respond to this type of service.

From the period, oh, '47 through '53 traffic grew to approximately 780,000 passengers by 1953.

[125] Q So you had then an increase from your 170 up to about—

A We, in effect, had a rebirth of passenger service.

Q Then what occurred after that?

A We maintained a fairly high level of public transportation during the period of the '50s. However, in 1959 we had another milestone year.

In 1959 it was the year that the pure jets were introduced to public service and the public was very quick to respond to the desirability of flying on pure jets. Almost overnight piston aircraft became obsolete. Aircraft fleets that had been worth many millions of dollars were suddenly impossible to sell.

And since the large jets that were introduced during the period '59, the large 707s and DC-8s could not operate from Burbank and public moved away again to the service offered at Los Angeles International Airport.

By that time, too, the major airlines had adopted the coach fare. So the combination of the coach fare and the jet travel prompted a gradual decline in passenger traffic, which commenced in '59 and continued.

Q What you are telling us is that when the pure jets of the 707s and DC-8s came in they required and necessitated a longer runway which you were unable to [126] accommodate them at Burbank and therefore they were unable to use your facilities, is that correct?

A That is correct.

Q I take it it is still true today,—

A Absolutely.

Q —to accommodate 707s or DC-8s.

A It is impossible.

Q All right. So as a result of new equipment being introduced into the industry it caused a decline in your passengers that were handled through Burbank Lockheed Terminal?

A That is correct.

Q What occurred after that? Was dual equipment put on the market?

A Traffic declined through—to 1965, and in and around 1965 there was an introduction by both the Boeing Aircraft Company and the Douglas Company of the small three-engine, two-engine aircraft, the 727 and the DC-9.

Q The 737?

A The 737 followed on later. Primarily it was the DC-9 and the 727-100.

Q And were they able to use the facilities at Burbank Lockheed?

A They were designed for a field such as ours, [127] and could very adequately and safely operate from the runways at Burbank.

Q Then what occurred after this took place, insofar as the operations of Lockheed Burbank were concerned?

A The public was quick to respond again to the availability of service which they found convenient and sought, and traffic has moved upward from the lull, I would say, of around 334,000 passenger in that year upwards to a million one seventy-eight in 1969.

THE COURT: What do you mean by "178"?

THE WITNESS: 1,178,000.

BY MR. PACKARD:

Q That was in 1969?

A That was in 1969.

Q So this brought you up to close to the peak that you originally had when you were serving the entire Los Angeles metropolitan area, is that correct?

A That is true. It's slightly below.

Q Now, do you have lease with the Federal Government insofar as any facilities that are being operated by them at the airport?

A Yes, we have a number of agreements, space agreements, with the Federal Aviation Agency on facilities which are owned and operated by the FAA at the airport. Would you like me to enumerate some of those?

[128] Q Well, first of all, do you have a lease with the FAA for the operation of the tower?

A That is correct. We have a space rental agreement. We provide the tower in accordance with their specifications and lease it to them on a space rental basis.

Q And their personnel entirely operate the tower, is that correct?

A Completely.

Q I believe what has been marked 29, referred to as "Agreement for Operation of Airport Traffic Control Tower" by the FAA.

Is that the document you referred to under which they operate the tower at the present time?

A That is correct.

MR. PACKARD: This is dated January 26, 1968, your Honor.

Q And that sets forth the terms and conditions under which the FAA operates the tower, is that a correct statement?

A That is correct.

Q And then there is certain government equipment used in the control of aircraft at Hollywood-Burbank, is that correct?

A That is correct.

Q I show you now what has been marked as [129] Exhibit 6 or part of Exhibit 6, and it consists of twelve items.

Is that the equipment list?

A Yea, this would be an equipment list of the U.S. Government equipment which is currently in use at the airport.

THE COURT: This is equipment other than the equipment which concerns the control tower, or does it include the control tower?

MR. PACKARD: It says like 1 and gives "Air Traffic Control Tower equipment located in Building 10" and then lists some of the things I think I wanted to refer to, like, "No. 8, Instrument Landing System," and we referred to that in connection with Runway 7.

Q Is that correct?

A That is correct.

Q This equipment here that has been listed, and rather than go through all of them, has to do with radar, navigational aids, radio equipment, transmitters and so forth, is that correct, the lighting and navigational aids?

A That is correct. It is primarily equipment to transmit and receive from aircraft, to locate aircraft, their position with regard to the airport, to aid and assist them in the proper navigation of the aircraft to the airport.

[130] THE COURT: That is a part of the tower control?

THE WITNESS: I would say that all of this comes under the control or is under the aegis of the tower.

There are such things listed here as runway lighting system. Runway lighting systems can be actuated in the control tower, depending on the runway in use.

In a sense, such things as the air surveillance radar, which is a radar, a continual radar sweep to locate existing aircraft within the zone of the airport and would have a read-out in Building 10.

[131] Q But certain equipment that is listed there physically located on the real property, so to speak, the ILS, and the like, and so forth, are physically located on the realty rather than in the tower.

A Remote from the control tower.

Q All right. In connection with your position as president of Lockheed Air Terminal, will you tell us, do you have anything to do in connection with approval of new or revised schedules for aircraft operating in and out?

A Our interest in schedules would be more from an operational sense. Reviewing the schedules from the standpoint of their compatibility with the other existing schedules of the airport. We have no, in a sense, direct control over the schedule.

Q I see. Apparently an airline has to obtain first route approval, is that correct?

A That is correct.

Q And an award is made by the CAB for a route?

A An award would be made by the CAB for interstate air commerce.

Q PUC?

A PUC for intra, that is correct.

Q Then how is that brought about, these awards, do you know?

[132] A Well, air transportation has got to be responsive to public need. Public hearings are held. An airline seeking to serve a population center or through a particular airport must file their intent to do so. They must demonstrate through public hearings that a public

need exists and that they are in a position operationally and financially to adequately serve that market.

Then after due deliberations, either by the Civil Aeronautics Board or PUC, a decision is handed down as to whether a route award will be made to that particular airline.

Q And is there some coordination that takes place by the air traffic control tower and the airlines as to the filing of their schedules so they are aware what schedules they are going to be operating under?

A Yes.

Q Will you please explain how that is handled?

A Yes. It is my understanding that all scheduled airlines must file an instrument flight rule flight plan. These schedules are normally filed, it is my understanding, at least 30 days prior to initiating any flight activity. They are filed with the Federal Aviation Air Traffic Control Center. The Center, as I understand it, coordinates and examines the new schedules to determine their compatibility with other traffic moving into the area.

[133] Q And then I take it you are aware in the management of Lockheed Air Terminal all the scheduling and any problems that develop, you have facilities available to handle the passenger load and so forth.

A That is correct.

Q That is your main function.

A That is our main concern, to make certain that the public's requirement on the airport, that the requirements are served.

THE COURT: The airport, I assume, is consulted by the CAB or the Public Utilities Commission to determine whether their facilities are sufficient to justify the awarding of the route which had been applied for by the carrier to your airport.

THE WITNESS: That is correct, your Honor. Normally, we do file a brief or appear at those public hearings.

THE COURT: You file a brief with the application of the carrier?

THE WITNESS: We will support a carrier to demonstrate that we are in full accord, that we believe their contention as to the market—the availability of the market and of the fact that we do have—

THE COURT: The facilities to take care of it.

[134] **THE WITNESS:** The facilities to accommodate air service.

BY MR. PACKARD:

Q You do support many times these applications that are made for the PUC or the CAB.

A That is correct.

Q It is your function in the management of Lockheed Air Terminal to do that.

A Yes, it is. It is a quasi-public utility we operate, and we are supported by such agencies, such civic groups as Chambers of Commerce in these endeavors. We are often aided by County representation, to show the need for traffic and, of course, by the City of Burbank.

[135] **Q** While you were on the Chamber of Commerce that gave you a closer feeling towards some of the needs in the community by which you could better serve Lockheed Air Terminal; is that correct?

A That is correct.

Q Now, at the present time what approximately would be the number of air carrier movements out of Lockheed's Burbank Terminal?

A The air carrier movement on an—

Q Annual basis.

A —annual basis would be in the order of 32,000 to 33,000. That would be a 1969 figure. I estimate it will be slightly—no. Actually we are running below—our air carrier movements are running below last year, so I would assume it would be somewhere in the 32,000 area for the current year.

Q How many passengers would that be, approximately?

A For the current year?

Q Yes.

A Perhaps a million three, a million four hundred thousand passengers.

Q At the present time are these movements in connection with intrastate as well as interstate carriers?

A Yes, correct.

[136] Q What carriers operate interstate?

A Interstate?

Q Interstate, yes.

A Air West and Continental are the primary interstate carriers at the present time.

Q In connection with the statistics which you have given us as far as the air carrier movement in the past years, what percentage of those are on pure jet?

A Approximately 97 percent.

Q Would you relate to us the equipment that is used by the operators on those pure jets at the present time?

A Yes. Currently there is the Boeing 727-200, the Boeing 737, and the DC-9.

Q In addition to the airlines' air carrier operation do you have any non-air carrier jets operating out of Hollywood-Burbank?

A Yes.

THE COURT: What do you mean by "non-air carriers"? Freight?

MR. PACKARD: I was talking about general aviation, privately-owned corporate jet operations.

THE COURT: I see.

THE WITNESS: Yes, we have quite a substantial traffic of corporate jet movements into and out of [137] the airport.

BY MR. PACKARD:

Q Could you name some of the corporations that are based at Hollywood-Burbank?

A Union Oil Company operates two jets.

Sears & Roebuck.

The Fluor Corporation.

Ambassador College.

Cal State Jetways.

Beldridge Oil Company.

Q What type of aircraft do these companies operate, various equipment?

A They range from the Lockheed Jetstar, the Gulfstream II, DeHavilland 125, Lear Jets, the French Falcon. Perhaps a Watch Commander or two.

Q Approximately how many movements of this category of equipment or aircraft take place each month, would you say?

A Just as an average I would say on the order of 275.

Q Are some of these movements at night?

A Approximately 60.

Q Do you have any jet cargo carriers operating out of Burbank?

A No. When the Flying Tigers relocated their [138] main offices to L.A. International the last of the pure cargo operation disappeared. They did transition with some jet aircraft, but that ended pure jet.

Q Now, there has been some evidence here to the effect that Hollywood-Burbank Airport is used as an alternate for LAX; is that correct?

A That is correct.

Q Do you know for what carriers?

A Primarily for United Air Lines and Western, PSA, and to a lesser extent Air West.

Q We talked about using it as an alternate. What is the purpose of an alternate? Maybe you had better explain to the court what we are talking about.

A We have abbreviated the title. It's a weather alternate. It is the use of the Hollywood-Burbank Airport when the Los Angeles International Airport, either through weather or for some other reason, it's impossible for aircraft to operate from their runways. And in those instances we call it an alternate operation. They use the facilities of the Hollywood-Burbank Airport.

Q Now, can you tell us approximately how often Hollywood-Burbank is used by scheduled airlines as an alternate over a year period, or any figures you may have in mind in that regard which may be of some help to the court?

[139] A Well, the vagaries of nature being what they are it varies substantially from year to year.

So, say, a three-year basis, we examine '67, '68 and '69, LAX was closed about 470 hours.

Q I see.

A And during this period—

THE COURT: Are those for three years or each year?

THE WITNESS: For those three years cumulative.
BY MR. PACKARD:

Q You ran some studies and this is what your studies indicated?

A Indicated, yes.

Q That was approximately 470 hours for the years '67, '68 and '69?

A That is correct.

Q During that period of time the Hollywood-Burbank Airport was able to provide an alternate facility?

A For virtually that entire period.

Q All right.

THE COURT: But not for the big jets, I guess. Not for the big jets?

THE WITNESS: No.

THE COURT: All right.

[140] What do they do, go to Ontario?

THE WITNESS: There are a number of airports. We receive them at Ontario. Some are delayed at Phoenix and Las Vegas, Palmdale.

BY MR. PACKARD:

Q In 1969 did you have any figures as to how many flights, say, Western or United you handled as an alternate?

A It's my recollection that we handled—between Western and United, something around 140 flights for those three years; not including, of course, PSA and Air West.

Q Now, this morning when opening statements were being made there was some reference made to the fact that under the 1970 Airport Act that the Lockheed Hollywood-Burbank Airport would not be entitled to any federal aid. Do you recall something of that reference?

A Yes, I do.

Q Would that have any effect other than receiving federal aid upon the operation and use of Hollywood-Burbank Airport?

A No. As a private airport we have never been a recipient of federal aid in the sense of grants that are extended to all public airports. However, the Federal Airport and Airways Act of 1970 contains a stipulation that [141] all airports conducting commercial air carrier activities will file for authority under the new Act for certification.

Q Well, the point I wanted to make is that the Act is applicable to Hollywood-Burbank?

A Very much so.

Q And the fact that you are privately—

MR. SIEG: Just a moment. May I object to this argument in terms of the question, your Honor? I believe the Act speaks for itself.

THE COURT: Yes, it speaks for itself. But this man testifying is an expert in this field. I would let him testify. On cross examination, why, you can bring out anything that you feel is, you know, erroneous.

I think it will save us time. All right.

BY MR. PACKARD:

Q My question was, is there any distinction contained within the Act of applicability to a privately-owned airport as opposed to a publicly-owned one? Do you understand what I am getting at?

A I understand.

Q Would you explain that to the court?

A It's my understanding that the Act would apply to us.

THE COURT: In other words, you have to be certified?

[142] THE WITNESS: We have to be certified.

THE COURT: Even though you are a private airport?

THE WITNESS: Correct. We intend to file for the federal certification.

THE COURT: That applies to any airport that is handling flights which involve interstate carriers; is that what you are saying? Is that the reason that you have to comply, because you handle interstate carriers

THE WITNESS: Certainly interstate carriers. I am not certain that it is refined that far. I believe it would apply to air carriers which might be intrastate. Intrastate, that's the only distinction. I'm not up on that, and, quite frankly, I can't testify to it.

THE COURT: All right. Go ahead.

MR. PACKARD: All right.

Q In closing, can you give us briefly the role that Hollywood-Burbank Airport will play in the future in the airport satellite system, as you understand it, and in the future, what you expect for the future?

A Well, there is greater emphasis on the development of satellite airports. The Civil Aeronautics Board has recognized the general congestion that exists at the major airports in and around the United States, the major population centers. There has been a recognition and, [143] certainly, in this area that satellite airports must recognize that they are in a position to more conveniently serve the population as the highways become increasingly congested, it becomes more difficult to reach the major airports.

Accordingly, we certainly hope to be in a position to serve this increasing public need to the extent that it develops at the Hollywood-Burbank Airport during the coming years.

MR. PACKARD: That's all I have, your Honor, with the exception that I would like to substitute for

the Exhibit 1 the one that is on the board here marked May we do that, your Honor?

THE COURT: Any objection to that?

MR. SIEG: None, your Honor.

THE COURT: All right. We will substitute the one on the board which Mr. Simmons has marked for the one in evidence.

MR. PACKARD: All right.

With that, that's all, your Honor.

THE COURT: Very well.

Cross-examine.

CROSS EXAMINATION

BY MR. SIEG:

Q Mr. Simmons, as I took down your testimony, [144] you have been with Lockheed Air Terminal, Inc., since 1946; is that correct?

A That is correct.

Q At that time who held the capital stock of Lockheed Air Terminal, Inc.?

A The Lockheed Aircraft Corporation.

Q In its entirety?

A In its entirety. We are a wholly-owned subsidiary of the Lockheed Aircraft Corporation.

Q It has been so at least since you have been connected with the company?

A It has been so since the purchase by Lockheed that I mentioned in the brief history in 1940.

Q Fine. And it is so at the present time?

A That is correct.

Q Has Lockheed Air Terminal, Inc., ever had a different name, different corporate name?

A Yes.

Q Would you explain?

A The airport was originally called United Airport. The original holding company, as I recall, was United Airports Transportation Company. In 1934 the corporate holding company's name was changed to United Air Lines Transportation Company. No, I'm incorrect on that. It was changed to United Airports of California, Ltd. The [145] stock at that time was controlled—was owned by what is now United Air Lines. The name was changed in 1934 from United Airports to Union Air Terminal. Then in 1940, in November, when the entire stock was acquired from the United Air Lines organization, the name was changed to Lockheed Air Terminal.

Then subsequently we changed the name to the Hollywood-Burbank Airport.

Q But the corporate name—

A But the corporate title, the corporate name commencing in 1940 has remained unchanged: Lockheed Air Terminal, Inc.

[146] Q I believe you indicated between or around 1943 substantial improvements were made to the airport?

A That is correct.

Q And were these financed by the United States Government or Lockheed Air Terminal, or some other corporation?

A It is my understanding that they were financed entirely by the United States Government.

Q This was in connection with the war production capacity?

A War production capacity at Lockheed at the time.

Q Now, were the runways enlarged at that time to their present length?

A The runways were expanded to full 6,000-foot lengths at that time. There has been an additional—some 20 years ago an additional 900 feet on Runway 15 for takeoff only but not for landing, so that the runways in effect were extended to 6,000 feet at that time, and basically remain at the same length at the present time.

Q You say the further extension on Runway 15 was accomplished about 20 years ago. This would be what, about 1950?

A Between—I can't recall precisely, but it would be in the period perhaps 1951 to '53, '54.

[147] Q At which end—I realize when we spoke of Runway 15 we are speaking of the north-to-the-south runway, as I recall it.

Which end of that runway—to which end of the runway was the extension made, to the north or the south?

A It was made on the north.

Q And how long—you have indicated that the prior improvements extended the runways to 6,000 feet. This added another 900 feet to Runway 15?

A That is correct.

Q And that is the runway for planes taking off, is that right?

A That is correct.

Q And those planes fly immediately over the City of Burbank?

A That is one of the runways for taking off.

Q Yes. But we are talking about Runway-15 at the moment.

A Yes.

Q Now, is that the longest of the four—I shouldn't put it in terms of four, 15 and its alternate heading, which is what, 33?

A Yes.

Q Is that the longest of the runways?

[148] A That is correct.

Q What is the present length of the Runways 25-7, for convenience?

A Approximately 6,000 feet.

Q Do I understand that Runway 15 we have just referred to is a preferential runway?

A Yes.

Q And why is that so, Mr. Simmons?

A The designation of a preferential runway usually follows either a terrain advantage or more—I would say more probably because of the favorable wind direction, the predominantly favorable wind direction.

Q Does downhill or uphill slope have anything to do with the preferential runway?

A It would be one of the components that would be considered.

THE COURT: You are talking about 15, now?

MR. SIEG: Yes. Well, I was talking generally—

THE COURT: I know you were. But you were talking about 15 that takes off over Burbank?

MR. SIEG: Yes.

THE COURT: That is the preferential runway, is what you said.

[149] BY MR. SIEG:

Q Isn't it a fact that Runway 15 slopes downward in that direction?

A The entire slope of the San Fernando Valley in that area is down and it follows the natural contour of the terrain.

Q Is that a factor which makes Runway 15 a preferential runway?

A I am a little out of my field here, but I think the wind direction would be more of a prevailing consideration than the slopes.

THE COURT: You say slope, are you talking about grade, that is, the elevation?

THE WITNESS: Yes. There is a grade differential between where I designated 15 and the area which—if I may point it out.

THE COURT: Yes. 15 is 150, so it would be almost north and south.

THE WITNESS: Yes, the whole terrain—this is hill area (indicating), and the whole terrain of the Valley slopes.

[150] THE COURT: It slopes from north to south?

THE WITNESS: From north to south.

THE COURT: Yes.

THE WITNESS: So following the normal contour of the valley this runway is higher at this end than this (indicating).

THE COURT: The north end is higher than the south end.

THE WITNESS: Of course, it is an advantage on takeoff. It is also an advantage because the terrain south of the airport drops away, so the aircraft in addition to their climbout have the advantage of getting additional altitude by virtue of the dropoff of the terrain.

THE COURT: Is there also a prevailing southerly that makes it good?

THE WITNESS: Yes, the wind rose generally is in this direction, the wind direction.

THE COURT: Southerly.

THE WITNESS: Right.

THE COURT: All right. Go ahead.

When I say "southerly" I mean it is a southerly wind.

THE WITNESS: A wind that blows from the south.

THE COURT: Yes.

[151] THE WITNESS: I have never been able to designate—

THE COURT: That is what I mean when I say "southerly".

THE WITNESS: That is right.

BY MR. SIEG:

Q Now, you have indicated that 1965 was the first year that pure jet aircraft was introduced at the airport?

A No, I indicated that 1965 was the first year of a rebirth of jet activity. We have had for many years jet, pure jet activity. We developed the first pure jet fighter for the United States Air Force and its initial test activities were all conducted at that airport.

Q What period was that?

A This would precede my tenure. I would say in the period immediately following World War II.

Q As far as traffic of any consequence or nature, pure jet travel aircraft, '65 was the year.

A It would be the first year of commercial jet activity.

Q Can you give me some idea of the amount and the increase in the use of these pure jet 727's and DC-9's, from '65 to, say, the present, or through 1967?

A On a basis of, say, daily flights?

[152] Q Yes.

A Last year we had an average of—we averaged 90 flight movements. That would be landing and takeoff. So that would mean there were 45, approximately 45 pure jet takeoffs.

THE COURT: How long?

BY MR. SIEG:

Q In a day?

A A period of a day.

THE COURT: 24 hours.

THE WITNESS: I am sorry, your Honor. A period of a day. My recollection would be that there were perhaps 30 pure jet takeoffs in the period of a day in 1965, '66 area, in that neighborhood.

BY MR. SIEG:

Q 15 landing and 15 taking off?

A No, the latter figure I gave you were takeoffs.

Q Were just takeoffs?

A Yes.

THE COURT: 60, then, total, in and out.

THE WITNESS: Yes.

BY MR. SIEG:

Q What you are saying is that from this—'65 was a total of 30 takeoffs as compared to, say, 1969, [153] when there were 45?

A Average 45 takeoffs in the period of a day, yes.

Q You are talking about a four-year period and the increase.

A In that vicinity, yes. As I mentioned earlier, that even though our traffic at the Hollywood-Burbank Airport is up approximately 20 per cent of the first seven months of this year, the aircraft movements are down 22 percent.

Q Why is that?

A Well, it is possibly due to the larger configuration of the aircraft. The 727-200 hauls more people. There are just more seats available on the aircraft, so you can move a larger number of people with pure takeoffs, and in the current year we lost the services

of Air California, which was an intrastate carrier that had previously—that had operated all the period of 1965.

THE COURT: Where did they go, to Orange County?

THE WITNESS: Yes, sir.

THE COURT: When you say traffic, Mr. Simmons, are you talking about passengers?

THE WITNESS: Yes.

THE COURT: You are not talking about the [154] movement of planes? When you say the traffic was up—

THE WITNESS: The people. We refer to traffic, that is our common denominator on our activity. That is revenue passenger traffic generated at the Burbank Airport.

THE COURT: Sometimes we talk about automobile traffic, we don't use it that way. I want to be sure I understand the terminology.

When you talk about traffic, you are talking about passenger traffic.

THE WITNESS: That is correct.

THE COURT: As distinguished from the movement of planes. All right.

THE WITNESS: The movement of an aircraft is a landing or a takeoff.

THE COURT: Or.

BY MR. SIEG:

Q You have indicated that your airport cannot accommodate the 707 or DC-8.

A That is correct.

Q I assume that is because of the length of the runways?

A That is correct.

Q Are there any standards imposed on you by any governmental agency or otherwise that sets standards of [155] runway lengths for the various types of aircraft?

A The Federal Aviation Agency does.

Q What is the minimum length for runways for the 727, either the 100 or the 200, and the DC-9?

A The minimum runway?

Q Minimum length.

A That is a difficult question to answer. I am not sure you have the right witness on the stand. It varies, of course, by the altitude, the heat. There are a number of components that influence the actual effective length of a runway. You would almost have to say a runway at a certain altitude during that—in connection with a certain temperature range, and I am just not well versed enough on those components to really give you a valid answer.

[156] Q Well, let me ask you this, Mr. Simmons. All these variables that you referred to, have there been occasions when your runways could not be used for the 727 or the DC-8 because of temperature conditions, and so forth?

THE COURT: DC-8?

THE WITNESS: DC-8?

MR. SIEG: I am sorry. The DC-9 or the 727.

THE WITNESS: No.

BY MR. SIEG:

Q You haven't found in any situation that they were inadequate to serve this type of jet aircraft?

A No.

Q Now, do you happen to know the length of the runway, minimum length required for the 707?

A My response there would be again—would be to introduce these components that have quite an effect on

the actual—the effective runway length. I am not content with that.

Q Well, I didn't mean to ask you something—I thought you responded to the effect that there were certain regulations specifying lengths of runway for the various types of aircraft.

A Well, I could answer—I could answer you generally that 6,000 feet would be inadequate for a 707.

Q Would be inadequate?

[157] A Would be inadequate for a 707 with a full gas load and a full passenger load. A 707 could be flown in very safely into Burbank for maintenance without a passenger load. It is the weight of the aircraft, too, that's one of the other components in the formula.

Q How about a 6,900-foot runway?

A For 707?

Q Yes.

A No, sir.

Q Too short yet?

A Too short.

Q Now, back to the more important feature. The corporate jets as you have described them that operate from the airport, you have indicated several companies. I believe you have also indicated that the cargo operations have ceased.

A That is correct.

Q The corporate jet operations, then, are primarily what? Passenger travel to various points within the state or without the state?

A Yes.

Q They are not cargo-carrying operations?

A No.

Q I assume Lockheed—well, let me ask you the question directly. Does your company, Lockheed Air Terminal, [158] Inc., have any corporate jet or jets that it operates?

A No, we operate no corporate jets.

Q How about Lockheed Aircraft Corporation?

A They do operate, of course, a jet.

Q One?

A It varies. We have several divisions in our company, and different divisions have jets. Not all operate with any frequency into Burbank. We have a corporate jet stationed at Burbank.

Q What type is it?

A It is the Lockheed Jetstar.

Q That has how many engines?

A Four small engines aft-mounted on the fuselage.

Q Is this what is called within the term of a pure jet?

A It's a pure jet.

Q But there is only one?

A One currently operating from Burbank.

Q Now, you have given us certain figures regarding air carrier movements. And I think you classified—you differentiated between the air carrier and these corporate jets, did you not?

A That is correct.

Q Of the 32,000 air carrier movements that you referred to, I believe, in '69—was it, roughly?

[159] A Thirty-two to thirty-three thousand.

Q Thirty-two to thirty-three?

A Yes.

Q —how many of those particular air carrier movements were between the hours of 11:00 p.m. and 7:00 a.m. in the morning?

A That would be during 1969. I don't believe that we have any statistical figures that would show that. That would include, of course, the PSA flights.

Q Yes.

A It would also include certain charter flights or alternate field flights that might have been generated during that year.

It's not a figure that we would be able to statistically substantiate.

Q Well, let me ask it this way, and maybe we can at least get some of the facts. As far as interstate carriers, during, say, the year prior to May 4th of this year, the effective date of our ordinance, the one that's in issue here, there were no interstate operations as far as takeoff between the hours of 11:00 p.m. and 7:00 a.m. in the morning, air carrier operations?

MR. PACKARD: You are talking about regular scheduled or—

MR. SIEG: I am talking about—

[160] THE COURT: Interstate, he said.

THE WITNESS: Yes. Interstate. And I am trying desperately in my mind to recall at what time Air West had a takeoff early in the morning during that year preceding the curfew.

THE COURT: Did they have a regularly scheduled takeoff, Air West?

THE WITNESS: I believe they did. They had a very early morning takeoff. I can't recall what time, but I know it came in and departed at a fairly early hour.

THE COURT: You mean before 7:00?

THE WITNESS: My recollection it was.

THE COURT: All right.

THE WITNESS: I may be disproved.

THE COURT: It can be checked out easy enough.

We will take our afternoon recess now, gentlemen, for about ten minutes.

(Recess taken.)

THE COURT: Very well, Mr. Sieg. You may proceed.

MR. SIEG: May I proceed, your Honor?

THE COURT: Yes.

BY MR. SIEG:

Q Mr. Simmons, have you had an opportunity to verify your thinking that Air West had a flight during the [161] year prior to May 4th of this year taking off between the hours of 11:00 p.m. and 7:00 a.m.?

A No. I was unable to substantiate that.

Q So as it stands here your testimony—or your previous suggestion is unsupportable at the moment?

A That is correct.

Q Now, as to intrastate carriers, and referring again to the hours of 11:00 p.m. to 7:00 a.m., we have stipulated already to the fact that there was a Sunday night flight 11:30 p.m. which you, I am sure, are familiar with. Were there any other intrastate flights by air carriers other than the PSA 11:30 flight, p.m. flight on Sunday?

THE COURT: Commercial carriers; is that right?

MR. SIEG: Yes. Commercial.

THE WITNESS: Commercial. If we are trying to define the total number in a year, it would be difficult for me to say because of the—

THE COURT: No. He is just asking you, as I understand it, were there any others. Now we know about PSA, the 11:30 flight. Were there any other commercial intrastate flights that were scheduled between 11:00 and 7:00?

Is that your question?

MR. SIEG: Yes, your Honor.

THE COURT: Yes.

[162] MR. PACKARD: Well, your Honor, you have used the term scheduled, and I don't think Mr. Sieg used the term scheduled. So I think we should understand whether we are talking about scheduled flights on a scheduled departure or whether we are talking about flights.

THE COURT: But my question includes scheduled. Mr. Sieg said that was his question, so it's scheduled intrastate flights other than the PSA during that period, during those hours.

THE WITNESS: I can't be certain of that. Air California may have had a flight during that period, I don't—

THE COURT: When did they move? Didn't they move down long before that?

THE WITNESS: They ceased operation at the Hollywood-Burbank Airport January the 15th of this year, your Honor.

THE COURT: Well, then, from May they wouldn't have been there?

THE WITNESS: You are talking about May—that preceding year, I think you said.

MR. SIEG: Preceding May of this year.

THE COURT: May of this year.

THE WITNESS: No. PSA would have been the only carrier.

[163] BY MR. SIEG:

Q Now, do you have any information or approximation as to the number of what you have referred to as corporate jets taking off between the hours of 11:00 p.m. and 7:00 a.m. in the morning during the year prior to May 4th of this year on the average, or whatever—

A We have no statistical information. I had indicated previously from the best judgment in reviewing our records that approximately 60 jets per month took off during the hours of darkness. I don't know whether the figure of approximately half that number during the curfew hours would be appropriate or not.

Q You just don't know?

A I don't know. Our records are not confined to that information.

Q Let me then go to this matter of applications to the CAB or PUC. In connection with such applications is my understanding correct that the applicant, whatever airline it may be, must satisfy the particular board that it has contracted for or arranged for, or whatever the legal arrangement is necessary, for space for use of your airport for the proposed route that is under consideration?

A I am not certain that that is a condition in the grant of the authority by the Board. We have made it a practice of advising them.

[164] Q So, you mean some airline—and I can't think of one offhand other than the ones we have been discussing—can simply go to any of these boards and say that "We want to use Hollywood-Burbank as a stop" or "as a landing or takeoff facility" and your consent is not necessary?

A The answer to your question has never been put to a test. We have always supplied information in those instances.

Q Well, you—

A We had excess capacity for a number of years, so it has not really been a problem.

[165] Q When you entered into contractual arrangements with these various airlines, as to the

charges you will make for use of your facilities, do you not?

A That is correct.

Q And you agree on these matters, do you not?

A This is correct.

THE COURT: You mean before the application is filed, is that what you mean?

THE WITNESS: No, not necessarily.

THE COURT: Not necessarily?

THE WITNESS: No.

THE COURT: Before an application is filed by a carrier, wouldn't the carrier check with you before it would represent to the CAB or the Public Utilities Commission that—before they would apply for a route to use in your terminal?

THE WITNESS: In general conversation, but nothing formal, not necessarily.

THE COURT: They wouldn't check with you first?

THE WITNESS: Yes, but no formal documents.

BY MR. SIEG:

Q At no time no formal documents?

THE COURT: Are you talking about before the application is filed?

[166] MR. SIEG: I am covering both before and after.

THE WITNESS: No, I don't think an airline would sign—ever in any instance sign a formal document for space prior to being granted the authority.

BY MR. SIEG:

Q Let me ask you this: On the use of your airport as an alternate to LAX, is there not a charge imposed by you, as Lockheed Air Terminal, Inc., for the use of your airport as an alternate?

A That is correct.

Q All right. Now, is this on the basis of a certain schedule of rates that you adopt from time to time?

A That is correct.

Q And this is a schedule which you, as Lockheed Air Terminal, Inc., put out?

A That is correct.

Q And does any body approve that schedule of rates?

A Any—define "body."

Q Any body, the CAB, the FAA or what-have-you?

A No.

Q In other words, you establish your own rates.

A That is correct.

Q And no one controlled you with respect to those [167] rates?

A No.

Q All right. Now, let's get to, if I may, the use of your airport as an alternate to LAX.

At the present time how many air carriers use your facilities as an alternate?

A Predominantly United Air Lines and Western would be second in the usage.

Q All right. That is two. Any others?

A Air West, PSA, and I am quite certain that Continental will be soon using the facilities.

Q All right. When LAX is fogged in or unable to receive air carriers of these, or air transports of these particular air carriers, do you have any regulations that you impose upon them regarding their landing or taking off from your airport?

A Are you indicating any regulation that we imposed upon them, other than what the FAA—

Q Yes.

A Of course, all of their flight activity into and out of the airport is under the FAA control.

Q I understand that.

A Operationally we may impose regulations on the airlines, using the airport, because at such time as we have an alternate field we may, in effect, have a large [168] number of aircraft suddenly on the field that we are not equipped to handle, so we from time to time impose gate restrictions and parking restrictions, et cetera.

Q Well, let me try to get you an example. I would assume at some time in the course of a year, for example, with LAX closed in that a carrier or an air transport would come into your airport, say, around 2:00 a.m. in the morning.

A Yes.

Q All right. Now, has that occurred?

A The field is open.

Q Yes. 2:00, 3:00, 4:00 a.m., or whatever.

A Now, as to when your airport is so used as an alternate, do you have any restrictions as to when that plane, that particular plane will leave your airport?

A Some time ago because United had such a volume of planes that used to land there, United became the largest carrier in the area, we imposed certain restrictions as to their takeoff because of just the physical problem of handling the planes on the ground, the passengers and so forth. So we worked out an understanding with them with respect to holding the planes and certain hours for departure.

[169] Q May we be specific on what you did impose and when?

A We had an understanding with them that the flights would not take off before 7:00 o'clock.

THE COURT: Regardless of when they came in?

THE WITNESS: No, if they came in in the early morning hours.

THE COURT: After 12:00?

THE WITNESS: 12:00 o'clock.

BY MR. SIEG:

Q: And they abided by these restrictions?

A: Yes. Normally, in a fog condition where they come in at that hour L.A. International normally doesn't open until 7:00 or 8:00 o'clock in the morning.

Q: And then these jets, would they then return or go to LAX, would that be their procedure?

A: To their destination, yes, LAX. They might, for example, be turned around and make their departure from Burbank.

THE COURT: But they wouldn't go to the large jet fields, like Ontario or Palmdale?

THE WITNESS: We are again, your Honor, talking about the small jets.

THE COURT: I know we are, but I say you wouldn't reroute them?

[170] THE WITNESS: No.

THE COURT: You say if their destination is Los Angeles, Los Angeles is fogged in, they stay there at Burbank until Los Angeles opens?

THE WITNESS: They either stay at Burbank until Los Angeles opens or they are serviced and turned around, as we call it. They are made ready for a flight departure to their other destination.

THE COURT: But never to the alternate fields for the big jets, if you follow me.

THE WITNESS: I am not sure that I do. They would—

THE COURT: As I understand it, the alternates for the big jets go to these other ones, Palmdale, Ontario and so forth.

THE WITNESS: Yes.

THE COURT: The small jets, the alternate is Burbank.

THE WITNESS: That is correct.

THE COURT: Now, rather than going into Los Angeles, where they would like to go, do you ever send them to the alternate open fields of Los Angeles which are used for the big jets?

THE WITNESS: No.

THE COURT: You do not?

[171] **THE WITNESS:** They would make the decision to come to Burbank and abide by it.

THE COURT: All right. Go to Burbank and then back to their former destination or wait until Los Angeles cleared up.

THE WITNESS: That is correct.

THE COURT: All right. Fine.

BY MR. SIEG:

Q Now, you have indicated that this rule was put into effect some time ago.

When was it first placed into effect? This is as to holding a—

A I am just am not certain when that went into effect.

Q When was that?

A I say I am not certain.

Q Oh, you are not?

A No.

Q Was it a year ago?

A No, it was, oh, 15 or 20 years ago.

Q It stayed into effect throughout—

A: It has been in effect since that time.

Q: Up to what point in time, now?

A: The present.

Q: And still continues?

[172] A: Yes.

Q: This is not a rule imposed by the FAA?

A: No.

Q: This is one imposed by you?

A: When you say a rule imposed by us, it is an agreement which was mutually agreed upon between United Air Lines operations and ourselves.

Q: Now, you refer to the Airport and Airways Act of 1970, and you have indicated that you have a certain familiarity with it.

The certification or obtaining certification by you as the airport operator, you must, as I recall the provisions of the Act, do this within two years, is that correct?

A: That is my understanding, yes.

Q: You are under no compulsion, are you, to obtain such a permit?

THE COURT: If you want to operate you do, don't you?

THE WITNESS: We have been advised that we must file for the authorization.

BY MR. SIEG:

Q: What I am indicating is that is only if you wish to continue to service air carriers,—

A: That is correct.

[173] Q: —of the type covered in the Act.

A: Correct.

THE COURT: What type are covered in the Act? If there is going to be an issue on that, what are they, interstate, commercial carriers or intrastate or all commercial carriers?

MR. SIEG: That is why I wanted to bring it up at this point in time.

THE COURT: All right.

MR. SIEG: I think this should be cleared up.

Under the miscellaneous provisions of the Airport and Airways Act there is a section entitled, "Airport Operating Certificate," and if you—maybe it would be well if we either refer to it or read it at this point, your Honor. I don't want to prolong this unnecessarily.

THE COURT: Is it complicated to the extent—does it apply to certain commercial aircraft?

MR. SIEG: Yes.

THE COURT: Well, is it interstate or intrastate or all commercial scheduled flights?

MR. SIEG: It says, "The Administrator"—and this is Section 612(a), "The Administrator is empowered to issue airport operating certificates to airports serving air carriers certificated by the Civil Aeronautics Board [174] and to establish minimum safety standards for the operations of such airports."

THE COURT: Then that would be interstate.

MR. SIEG: That would be correct, as I would understand it.

THE COURT: All right. Hearing nothing from the plaintiffs, why, we will assume that is it.

MR. SIEG: This section ends with the statement about the two years and it does cover and refer to the areas that will be involved in certification. They are the installation, operation, maintenance of adequate air navigational facilities.

[175] THE COURT: When is the effective date of the Act, 1970?

MR. SIEG: Yes, sir. The amendment was effective May 21, 1970. Does that conform with your understanding?

MR. CHRISTOPHER: I believe that's right.

THE COURT: May 21st. All right.

MR. SIEG: Reference has been made several times in the briefs to the public law number or the statute number.

THE COURT: All right.

MR. SIEG: I believe that's all I have at this time, your Honor.

THE COURT: Any redirect?

MR. SIEG: I have just one. I am sorry.

THE COURT: Yes.

BY MR. SIEG:

Q Mr. Simmons, did you at the request of the City of Burbank prepare a list of those situations which you deemed would constitute an emergency under the provisions of the ordinance involved here?

A That is correct.

MR. SIEG: Please excuse me just a moment, your Honor. I should have had this available, but I wasn't sure of which witness—I have a document here that I [176] would appreciate having marked for identification at this time, your Honor.

THE COURT: All right.

THE CLERK: Defendants' Exhibit A for identification.

(The exhibit referred to was marked Defendants' Exhibit A for identification.)

THE COURT: What is this, please?

MR. SIEG: It is entitled "Emergency Conditions Justifying a Jet Departure During Curfew Hours."

THE COURT: All right. Dated?

MR. SIEG: No date, your Honor.

THE COURT: For identification.

MR. PACKARD: Are you offering it?

MR. SIEG: Not yet.

MR. PACKARD: All right.

THE COURT: Is this something prepared by Mr. Simmons, is that what you are saying?

MR. SIEG: I believe so, your Honor, yes.

THE WITNESS: Your Honor, prepared at my direction.

THE COURT: I see. All right. You are offering it in evidence?

MR. SIEG: Not yet. I would like to have Mr. Simmons look at it first, because I could be possibly [177] in error on what I am asking. Is that agreeable to your Honor?

THE COURT: Yes.

MR. SIEG: May I approach the witness?

THE COURT: Surely.

BY MR. SIEG:

Q I show you Defendants' Exhibit A for identification and ask you if you recognize the particular document?

A Yes.

Q Was that prepared under your direction?

A That is correct.

Q And submitted to the City of Burbank?

A Yes.

Q Are you presently operating under those particular emergency conditions?

A That is correct.

MR. SIEG: I would at this time offer Defendants' Exhibit A for identification in evidence.

MR. PACKARD: Well, your Honor, I have no objection with the exception that I want it understood that these emergencies as set forth are not part of the ordinance per se.

THE COURT: No. The ordinance refers to emergency flights.

[178] **MR. PACKARD:** It doesn't set forth what emergencies are. This is just what they have—

THE COURT: It refers to emergency conditions, the ordinance does. Evidently through Mr. Simmons, following his instructions, why, emergency conditions have been set up while they are operating here under the conditions at this time, as I understand it.

MR. PACKARD: All right. But I just want it understood that this exhibit, which is being offered, is not part of the ordinance itself.

THE COURT: No. As I understand it was prepared—he said it was prepared under his instructions pursuant to the ordinance because of the emergency provisions set forth in the ordinance. Is that right?

THE WITNESS: That is correct, your Honor.

THE COURT: Yes.

MR. CHRISTOPHER: Your Honor, may I be heard for a moment on this subject also?

THE COURT: Well, if you have an objection to it.

MR. CHRISTOPHER: I do have an objection to it, your Honor.

THE COURT: All right.

MR. CHRISTOPHER: It seems to me that the receipt of this evidence will confuse the record in this case [179] because the so-called list of emergencies are only an informal arrangement which is subject to being set aside at any time by the City of Burbank.

The emergencies are administered by the City Attorney's office and the City's Police Department. To have the list of emergencies in the record suggests that the ordinance is modified to that extent, which I think would be a confusing impression.

When the City Attorney, Mr. Gorlick, returned this list of emergency conditions to Mr. Simmons that I am now—and I am now referring to the letter of May 1, 1970, from Mr. Gorlick to Mr. Simmons—he indicated that these conditions could be used for the time being. He went on to say that if there are any modifications "You will be notified," thus making it clear that the discretion and power with respect to these list of emergencies is retained by the City of Burbank and specifically by the City Attorney and by the City's Police Department.

THE COURT: Yes. There probably will be matters that get into evidence here that ultimately will be determined are not material. But it is very difficult to tell at this time.

I am going to let it in. Although I understand what the list is for and how it was obtained. If you want to submit your letter as explanatory to the position of the [180] Police Department, I am sure it will get favorable consideration.

A is ordered in evidence.

(The exhibit previously marked Defendants' Exhibit A was received in evidence.)

MR. SIEG: Just to clear that point, I am not unwilling—in fact I think it should be—the letter should go in evidence with this document.

THE COURT: Is that agreeable, Mr. Christopher?

MR. CHRISTOPHER: Yes.

MR. PACKARD: Yes.

MR. SIEG: Shall we make it part of the same exhibit, your Honor?

THE COURT: Make it part of the same exhibit, yes. A. That's the letter dated—

MR. SIEG: May 1, 1970, directed to Mr. David M. Simmons by Samuel Gorlick, City Attorney, City of Burbank.

THE COURT: All right. A-1.

(The exhibit referred to was marked Defendants' Exhibit A-1 was received in evidence.)

MR. SIEG: I would like to ask, in view of the comment, Mr. Simmons one last question.

Q Up to the present time, Mr. Simmons, has the City of Burbank abided by the emergency conditions which you requested?

[181] A To my knowledge, they have.

MR. SIEG: Thank you.

MR. CHRISTOPHER: Your Honor, I have a few questions on redirect.

THE COURT: All right.

REDIRECT EXAMINATION
BY MR. CHRISTOPHER:

Q Mr. Simmons, you described an understanding between the airport and United Air Lines with respect to the time of takeoff of aircraft which use your airport for alternate landings during weather problems at LAX.

Now, you said in your testimony that that was not a rule but was an understanding between yourself and United. Is that understanding still in effect?

A That is correct.

Q Would you tell me what the reasons are for the existence of that understanding between United and the airport that planes will not take off—or that United

Air Lines planes will not take off until after 7:00 a.m. when they use Hollywood-Burbank Airport as an alternate?

A Basically it was because of the large number of aircraft that United had that would land at the airport during an alternate field operation. And quite frankly during those hours we had no warning with respect to getting personnel to the field, to adequately handle the movement of [182] aircraft on and around the airport.

We discussed the problem, just the sheer numbers of aircraft and the security and maintenance problem that confronted us. We mutually agreed that by, in effect, stabilizing the aircraft when they landed so that we weren't confronted with landings and takeoffs at least we cut our workload down to what we hoped would be a manageable point until additional personnel could be called in.

[183] Q Mr. Simmons, you indicated that three other air carriers used Hollywood-Burbank Airport as an alternate. The air carriers you indicated, as I recall, were Air West, PSA, and Western. Do you have a comparable understanding with Western?

A No, we do not. We have never had, really, a large alternate field operation in terms of sheer numbers of aircraft with either of those other carriers.

Q Do you have a comparable understanding with Air West?

A No.

Q Do you have a comparable understanding with PSA?

A No, we do not.

Q You indicated that Continental Airlines may soon commence to use Hollywood-Burbank Airport as an alternate, having commenced regular services there.

Do you have a comparable understanding with Continental?

A We do not.

Q In the course of your testimony, Mr. Simmons, you indicated that the preferential runway at Hollywood-Burbank Airport is Runway 15. You gave reasons for that being the preferential runway.

In that connection I would like to hand you a portion of Exhibit No. 30, which is a portion marked [184] Burbank 7100.5B, and which is the FAA Noise Abatement Order. I would like to call your attention to subparagraph C of paragraph 5 and ask you to read that paragraph for the court.

THE COURT: What page was it?

MR. CHRISTOPHER: On the second page, your Honor.

THE WITNESS: Page 2?

THE COURT: Yes. Subparagraph C.

MR. CHRISTOPHER: Yes, your Honor.

THE COURT: What is that, 5?

MR. CHRISTOPHER: 7100.5B. It is subparagraph C of paragraph 5. If you look on the first page you will see it is paragraph 5, your Honor, I believe.

THE COURT: Very well. That isn't the one I have here. This is 7100.5B. It is supposed to be in here and it is 7100.3. Is there some confusion here?

MR. CHRISTOPHER: In that exhibit we put not only the current noise abatement order but the three preceding.

THE COURT: I see. Several of them in it?

MR. CHRISTOPHER: Yes.

THE COURT: All right. Go ahead.

THE WITNESS: "C. Traffic and weather permitting use Runway 25 for departures of turbine-pow-

and [185] aircraft as much as possible during the period from approximately 2300 to 0700 local time when people are asleep (residential area is less dense and farther from end of runway west of 25 than south of 15.)"

BY MR. CHRISTOPHER:

Q Does that indicate to you, Mr. Simmons, that Runway 25 is a preferential runway during the hours mentioned?

A That is correct.

Q Can you explain how that particular noise abatement order would be followed at Hollywood-Burbank Airport?

A It would be followed by tower direction as advice to the departing pilots.

MR. CHRISTOPHER: Your Honor, have you found the correct document?

THE COURT: I have it here. But it talks about arrivals. 5B, is it?

MR. CHRISTOPHER: 5C, your Honor.

THE COURT: Oh. "Traffic and weather permitting..." I see. Yes. Departure. Yes.

BY MR. CHRISTOPHER:

Q Now, having had your attention called to this document, Mr. Simmons, do you wish to qualify or explain your testimony with respect to Runway 15 being the [186] preferential runway at Hollywood-Burbank Airport?

A Yes. I would qualify my previous testimony to the extent that during certain hours of the day for the takeoff of turbine-powered aircraft—and I would term this to be pure jet—that the preferential runway is Runway 25 for takeoff.

Q Perhaps more accurately, Mr. Simmons, during certain hours of the night?

A Certain hours of the night.

Q What city do planes fly over when they take off on Runway 25 as a preferential runway during those hours of the night?

A Takeoff west on 25, they would be immediately over the City of Los Angeles.

Q And not over the City of Burbank?

A And not over the City of Burbank.

MR. CHRISTOPHER: I have nothing more.

THE COURT: All right. Anything further?

MR. PACKARD: No further questions, your Honor.

THE COURT: All right. Thank you, Mr. Simmons. You may step down, sir.

(Witness excused.)

THE COURT: Next witness.

MR. CHRISTOPHER: Your Honor, there has [187] conversation concerning Exhibit No. 54, the affidavit of Richard S. Shreve, and I hope I am correctly reflecting the situation when I say that I understand Mr. Sieg has no objection to the receipt of that exhibit into evidence, with the understanding that the plaintiffs will stipulate and intervening plaintiff will stipulate, and we do so stipulate, that there is no airmail presently carried to or from Hollywood-Burbank Airport.

Is that our understanding, Mr. Sieg?

MR. SIEG: Yes, it is.

THE COURT: All right.

4 is ordered in evidence, with that understanding.

MR. CHRISTOPHER: 54, your Honor.

MR. SIEG: I understood there was a group of other documents that went in with this.

THE COURT: 54, yes. 54 is the one about the mail that you discussed at noon.

MR. CHRISTOPHER: Yes, your Honor. The one showing the 48 percent of the airmail at those four airports moved during—

THE COURT: I have a notation Mr. Sieg was going to examine 4, too. But we cleared that up before?

MR. SIEG: Yes.

MR. CHRISTOPHER: Yes.

[188] THE COURT: Yes.

MR. SIEG: Was there nothing more with this?

All right. No objection to 54, your Honor.

THE COURT: With the understanding that there was no mail out of Hollywood-Burbank.

MR. CHRISTOPHER: Yes, your Honor. In or out of Burbank.

THE COURT: All right.

MR. PACKARD: I think 4, your Honor, has been admitted, has it not?

THE COURT: Yes, it has been admitted.

Very well.

(Plaintiffs' Exhibit 54 for identification was received in evidence.)

MR. CHRISTOPHER: Your Honor, I would like to call Ben L. Freiman.

BENJAMIN LEON FREIMAN,
called as a witness on behalf of the intervening plaintiff, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated.

Please state your name, please.

THE WITNESS: Benjamin Leon Freiman.

[189] DIRECT EXAMINATION
BY MR. CHRISTOPHER:

Q Please spell your last name.

A Freiman, F-r-e-i-m-a-n.

Q What is your present residence address, Mr. Freiman?

A 39756 Country Club Drive, Palmdale, California.

Q Would you indicate what your present occupation and position is?

A Yes. I am Chief of the Los Angeles Air Traffic Control Center at Palmdale, California, Federal Aviation Administration.

Q Would you tell the court briefly, Mr. Freiman, what your past positions in aviation have been, how you got started in aviation and a quick sketch of your career in aviation?

A Yes. I originally got started back in the mid-30s in flying at Seattle, Washington. Subsequent time in the Navy as an air traffic controller and working for the predecessor of FAA, CAA. In 1945 at Yakima, Washington, I was a controller. Seattle, Washington, as a controller, and in Honolulu, Hawaii, as an air traffic controller.

And back to Seattle in 1947. Remained there until 1957. Was assigned to the Larson Air Force Base, Washington, as an FAA resident inspector. Then moved [190] on to the Los Angeles Regional Office in the Procedures Branch. Stayed there for approximately four years. Then to the Los Angeles Center in 1964 for one year as Assistant Chief.

Returned to the Regional Headquarters in Los Angeles for two years and four months until reassignment at the Los Angeles Center in January of '68 and my present position.

Q Taking just the last two positions, you referred to your position at the Regional Headquarters. Is that the Regional Headquarters of the Federal Aviation Agency here in Los Angeles?

A Yes, for the Western Region.

Q What, again, was your position there, Mr. Freiman?

A I was Chief of the Procedures Branch.

Q Would you tell us briefly what the scope of your responsibilities there was?

A Yes. That was actually the Airspace and Procedures Branch. We had the responsibility of working with our facilities in the Western Region, other regions in Washington Headquarters in the development of procedures regarding air traffic control for the nine Western States.

[191] Q Now, as head of the Los Angeles Air Traffic Control Center at Palmdale would you describe the scope of your present responsibilities?

A Yes. I have the responsibility for the management of the operations and the personnel of that facility administratively. We have approximately 550 personnel on board at that facility at this time.

Q How many aircraft do you handle through the Center each day?

A 3,000, approximately 3,000 per day.

Q What is the geographical scope of your responsibility?

A We are bounded on the south by the United States-Mexican Border, east by the Colorado River, north by mid-California, and approximately 150 miles inward. It covers 184,000 square miles, approximately.

Q Generally speaking, Mr. Freiman, what are the goals of the Los Angeles Center and you as its head?

A The goals of the Los Angeles Center and myself, as well as the total Agency, are for the safe and expeditious handling of aircraft and to insure good use of the navigable airspace.

Q You have referred to one of the goals as being the safe handling of aircraft. Would you comment further on how you effectuate that goal at the L.A. Center?

[192] A Yes, we strive, of course, to—for the safety of flight, and we do this through the development of procedures throughout the entire system and within the Los Angeles Center's area.

Q The other word you used in describing your goals was the expeditious handling of aircraft. Would you describe how you work at the Center in trying to achieve those goals?

A Yes, we try to make the maximum utilization of the airspace available, to provide the expeditious movement of the aircraft. In other words, not waste any airspace, not to delay aircraft.

Q Will you describe the relationship between the Los Angeles Center at Palmdale which you head, Mr. Freiman, and the Air Traffic Control Tower at the Hollywood-Burbank Airport?

A Yes. The Los Angeles Center, as all traffic control centers throughout the United States, has the total responsibility for the control of the airspace. In the case of terminal locations, such as Burbank, we subdelegate airspace, define it geographically and also vertically, and by agreement between the two facilities we make the best use of the airspace.

Q Is there a subdelegation from your L. A. Center at Palmdale to the Hollywood-Burbank tower?

[193] A Yes, there is.

Q Now, Mr. Freiman, exhibits in evidence here, Exhibits 18, 19, and 22, indicate that scheduled jet passenger aircraft must follow instrument flight rules when they travel to and from Hollywood-Burbank Airport.

Are you familiar with that requirement?

A Yes, I am.

Q In view of that requirement I would like to ask you to describe to the court step by step a typical IFR or instrument flight rule flight from, let's say, Hollywood-Burbank Airport to San Francisco International Airport, from the standpoint of your role and from the standpoint of the air traffic control.

Take it step by step through, if you will.

A Fine. Initially the pilot must file a flight plan, and as the previous witness stated, some of these flight plans can be filed as much as 30 days in advance, with air carrier aircraft, since they fly the same routes and altitudes normally every day.

Once a flight plan has been filed with the Los Angeles Air Traffic Control Center the information is inserted in our computer, providing the information provided to us by the pilot.

Q That is your computer at Palmdale?

A Yes. The information, whether it be stored [194] 30 days in advance or 30 minutes in advance, once it is in the computer the end result is the same. The computer searches the tapes for flights that are due off every 15 minutes.

Once the computer finds a particular flight ready for departure within this time frame, the computer provides a strip to the Hollywood-Burbank Tower, and likewise an identical slip flight progressed up to the appropriate sectors within the Center.

Once that has been accomplished the aircraft merely has to advise the Hollywood-Burbank Tower that he is ready for his instrument flight rule clearance.

Q At what point would he do that, Mr. Freiman?

A At what point would the pilot do this?

Q Yes.

A After he was ready to go and he had his engine started.

[195] Q Passengers on board?

A Passengers on board, and he would then call the Hollywood-Burbank Tower for his instrument flight rule clearance.

Q Would he ask at that point permission to taxi as well?

A Yes. The first thing he would get would be the instrument flight rule clearance read to him, and then after he acknowledged that he would subsequently be given taxi instructions.

He can get that one of two ways. He can tune to a particular frequency called ATIS, called Airport Traffic Information Service, which is continually played on a tape so that the pilot can hear this and not have to block the tower frequency. If he doesn't have that capability, he then asks for that information. If he does have it he merely says, "Hollywood-Burbank Tower. Particular aircraft ready to taxi. Have echo" or "Bravo," whichever the case may be, indicating he has the taxi information. If he has done it in this manner he is then merely cleared to the runway. If not, he is given the wind information and the time and the altimeter that was previously given on a tape.

Q What does he do next or what does air traffic control do next?

[196] A Well, the tower portion would be to provide the aircraft taxi to the appropriate runway for takeoff.

Once the pilot requested clearance for takeoff, and was so given his clearance, he would remain on the control tower frequency until he crossed the boundary of the airport, at which time he would go to the departure control frequency which is located just below the tower.

Q At Hollywood-Burbank?

A At Hollywood-Burbank. And they would control the aircraft, provide separation from other aircraft until such time as he is ready to leave the airspace we had subdelegated and enter our own airspace.

Q You say he would control the aircraft and provide separation. Would you spell that out for us in terms more understandable to us laymen?

A Yes. Basically to take an aircraft from Hollywood-Burbank to San Francisco, as an example, the aircraft would have either filed a standard instrument departure or could have received one, which would indicate routing that would be in the format of a chart that he has to get to a certain point at certain altitudes. He follows these routings.

Once he obtains the headings and the altitudes specified in these standards of departure the tower merely observes the aircraft in the radar, giving traffic information [197] and altering his route if it becomes necessary.

Q What happens next in this trip from Burbank to San Francisco?

A As he prepares to depart the airspace subdelegated to the Burbank—out of the Burbank tower the controller at that facility would call the controller in

our facility and identify the aircraft to us on radar. We would acknowledge the identification to the tower controller at Burbank. He would then have that aircraft changed to our frequency and we would assume control as he proceeded toward San Francisco.

About Paso Robles, California, is the dividing line between the Oakland air route traffic control center and the Los Angeles air route traffic control center, and we will use the same procedure in handing the aircraft off to the Oakland Center.

Q Then at what point would the Oakland Center relinquish control to a subsequent tower?

A As he approached the airspace that the Oakland Center would have subdelegated to the San Francisco tower, as an example.

Q So on every portion of this IFR trip from Burbank to San Francisco the airplane is under and the pilot is under explicit instructions from either a tower or your Center?

[198] A That is correct.

Q In your experience, or from your experience, both at the regional headquarters and at the Center in Palmdale, which you had, Mr. Freiman, how would you describe the air traffic situation in the Los Angeles Basin with respect to congestion?

A It is quite congested.

Q What are the hours in which the congestion is the greatest?

A Well, there are peaks and valleys in the hours, but the major congestion occurs between 6:00 p.m., approximately, and 9:30 p.m. local time.

Q When you described as being quite congested, what does that mean to you as an experienced controller in the Los Angeles Center?

A Well, we are making use of all available airspace at that particular time.

Q What airport in this region is the most congested?

A Los Angeles International.

Q Can you describe the steps that you and your controller colleagues have taken in an attempt to reduce congestion in this area?

A Yes, we are constantly working with the terminal facilities to improve our procedures, by modifying [199] existing procedures, coming up with new procedures and working with the terminals very closely with the ever changing traffic picture.

Q There are documents in evidence and there has been reference here, Mr. Freiman, to the concept of flow control.

Would you describe to the court the concept of flow control as you understand it and as you employ it?

A Well, basically, flow control is a method or a means of metering traffic for any given condition. That is the primary purpose, whether it be weather at one location or a problem at an airport or just too many airplanes. It is a means of metering traffic.

Q You use the word "metering." Would you define that for us and tell us what it encompasses?

A We have several methods in which we can employ that procedure. One is to hold the aircraft on the ground and provide a time spacing that is greater than normal.

We can hold aircraft on the ground and increase the mileage interval between aircraft greater than normal; or we can require aircraft to utilize different procedures or go to higher or different altitudes.

Q Do you have flow control specialists who are on duty regularly at the Los Angeles Center?

A Yes, sir, we have a staff of four.

[200] Q How do they operate in their jobs, Mr. Freiman?

A We have a position of operation within the facility that is constantly alert as to weather conditions, both within our own area and adjacent areas, and any problem that may occur at an airport.

It is their responsibility to insure that the system does not become saturated and also to insure that airspace is not wasted, that the airspace is used properly.

Q Would you give us an example of how this concept of flow control might be employed with respect to Hollywood-Burbank Airport?

A Well, as an example, we could have the weather situation in San Francisco which would curtail the numbers of flights that could be received at San Francisco, or any other given airport, which would require us to place a restriction on airplanes departing Burbank.

Q Within the concept of flow control, as you have explained it, then that restriction might be to hold the aircraft on the ground, tell them they couldn't take off, or provide a greater spacing or interval or both?

A Both or also an alternate routing, if necessary, if one was available.

[201] Q So there are really three possibilities: You can give an alternate routing, you could increase the interval or hold the aircraft on the ground for a given period of time?

A That is correct. Or provide an altitude different than what the pilot requested.

Q We had also a reference here today, Mr. Freiman—I am not sure you were in the courtroom at the time it came up—to the concept of centralized flow control, which the documents indicate was put in only this year.

Would you explain to the court what centralized flow control system is, how it relates to the older concept of flow control?

A Yes. Central Flow Control is under the Systems Command Division located in our Washington office.

THE COURT: You are using the word "flow" now rather than "full"?

THE WITNESS: Flow, f-l-o-w.

THE COURT: Yes.

THE WITNESS: We established—I shouldn't say "we"—the FAA established this position quite some time ago to assist the various air route traffic control centers in determining routes or providing alternate routes or providing alternate means of getting [202] aircraft into certain areas under certain conditions.

A good example would be during the summertime, Eastern California, Colorado, and places like that where the thunderstorm activity is quite intense, airplanes obviously want to follow the route that takes them away from this type of activity. In so doing it sometimes saturates a given route, provides too many airplanes, or would provide too many airplanes or more airplanes than the system could really accept without causing delays to the aircraft.

So, therefore, Central Flow Control in Washington is contacted by the various facilities and they help us provide alternate routes or alternate means of spacing the aircraft or rerouting the aircraft on a national basis.

BY MR. CHRISTOPHER:

Q Would it be your responsibility to consult with Centralized Flow Control before imposing flow control here within your region?

A Yes, it would.

Q What is the mechanism for doing that?

A The flow controller has this function at his position of operation. Should the necessity arise for us to impose flow control restrictions to San Francisco, that would actually originate out of the Oakland Air Route Traffic [203] Control Center rather than out of our center, because they are imposing the restriction on us. But should we impose one in reverse, then it would be our obligation to go to the Central Flow Control Facility and obtain their concurrence, or at least brief them on what we are doing and why we were doing it.

THE COURT: In other words, you would impose a flow control restriction as to planes coming into your area?

THE WITNESS: Yes, your Honor.

THE COURT: And San Francisco, for example, would impose them for planes coming into the San Francisco from this area?

THE WITNESS: Normally, your Honor.

THE COURT: Or other areas?

THE WITNESS: Yes.

THE COURT: I see.

BY MR. CHRISTOPHER:

Q What function, Mr. Freiman, to extend that thought, would the local airport tower play with respect to flow control? Would the local airport tower contact you or contact the Center if they found themselves in a position of overload?

A Yes. If they would believe they were going to have delays in a period of 30 minutes or more it would be [204] the responsibility of that particular terminal facility or tower, if you will, to contact us and tell us why and what the anticipated delay would be so that we could in turn develop flow control procedures to match that requirement.

Q Would you adapt that particular answer to the for-instance you gave us of a plane going from Burbank

to Oakland and suppose there was congestion at one of the San Francisco airports?

A San Francisco would advise—or, rather, the Oakland Air Route Traffic Control Center would advise us that for aircraft Los Angeles-San Francisco they would like to have 30 miles in trail, and by that I mean they want the airplanes no closer than 30 miles, or any other given distance. Or they would ask for a time spacing of 15 minutes between aircraft. We would in turn impose that, of course, on the Burbank-Hollywood Tower.

Q The result of that might be holding aircraft on the ground at Hollywood-Burbank for a period of time so the spacing could be achieved?

A Very definitely.

Q In your various positions here in the Los Angeles area in the Regional Office and now as head of the Center, have you had experience with the noise abatement problems and noise abatement procedures?

[205] A Yes, sir; I have.

Q Have you had a recent experience in connection with Los Angeles International Airport?

A Yes, sir.

Q Would you tell us about it, please?

A I think it was approximately three or four months ago we developed procedures applicable to the departing aircraft at Los Angeles International Airport to provide a routing that would clear certain areas during specific hours.

Basically, prior to the hour of 2300 or 11:00 p.m. local at night and 7:00 a.m. local in the morning we have two procedures that we use primarily for aircraft that are proceeding either north and east, purely east-bound or southbound.

97 percent of the departures at Los Angeles occur to the west.

THE COURT: To the what?

THE WITNESS: West.

THE COURT: West.

THE WITNESS: The aircraft proceeding in the general area of Chicago, as an example, or Denver, normally make a right turn and proceed out over Santa Monica and up through the pass around Palmdale, a little south of Palmdale, and then on east.

[206] Aircraft going to the southeastern part of the United States normally make a left turn, go over Long Beach and proceed eastbound.

BY MR. CHRISTOPHER:

Q What problem was it that you were specifically dealing with, Mr. Freiman?

A To avoid these particular areas during hours of 2300 or 11:00 p.m. local time to 7:00 local time and to find a procedure which would then take the aircraft on a pass that would reduce the noise in the area during those hours.

Q And what procedure did you adopt or adapt for this purpose?

A We developed a procedure that all aircraft departing to the west between those hours would proceed on a heading of approximately 250 degrees until reaching approximately 10,000 to 13,000 feet, then make only a left turn, coming back over the shoreline and then back on the normal routing after that point.

Q Thus the plane would go out over the San Pedro Harbor or the water areas there rather than over the center of Los Angeles?

A That is correct. At that point the coastal line is considerably east of where it would be to the north of that.

[207] Q How is this new procedure communicated to pilots of aircraft departing from Los Angeles International Airport?

A For those pilots who advise they have the Standard Instrument Departure we merely assign what we call the Ocean 1 SID, and that is a name and the number 1 indicates it is the first procedure for the particular SID.

THE COURT: What do you mean? What is SID?

THE WITNESS: Standard Instrument Departure, your Honor.

THE COURT: Yes.

BY MR. CHRISTOPHER:

Q You say you assign that. How is that assignment communicated to the pilot?

A In the case of the air carrier flights they normally store the flight plan, as we have mentioned earlier, some 30 days in advance. That is stored in the computer and that is part of the routing in the flight plan which is prefilled by the pilot—by the company for the pilot.

[208] THE COURT: In other words, the pilot knows that and he includes that in his flight plan?

THE WITNESS: Yes, sir.

THE COURT: Yes.

BY MR. CHRISTOPHER:

Q Is there likely to be any communication between the tower and the pilot with respect to following a new procedure?

A If the pilot had filed a flight plan which included the SID, the Ocean 1 SID, there would be no communication except to say to the pilot, "Cleared as filed." He has indicated he would follow that procedure.

If he had not followed that procedure the communication from the tower would be to assign that procedure.

Q The tower would tell him to go out and turn left rather than going out and turning right?

A He would merely assign the SID. If the pilot was aware—if the tower controller was aware the pilot had the SID he would merely assign the SID. If he did not have the SID information, the controller would spell the procedure out to him.

Q Mr. Freiman, I would like to hand you a portion of Exhibit No. 30.

Again, your Honor, this is BUR 7100.5B. This document Mr. Freiman has referred to as an Informal Runway [209] Use Program and FAA Noise Abatement Order to that effect.

Would you tell us the difference between informal noise abatement procedure and a formal noise abatement procedure?

A Well, the informal procedures are used and assigned by the control tower personnel as the need arises.

On a formal procedure the procedures are normally spelled out in a written procedure which makes it mandatory for the pilot to follow those except if he elects not to follow for safety reasons.

Q When an informal procedure has been given to the pilot by the tower what is the effect upon the pilot's clearance or direction?

A That is made a part of his clearance.

Q Or a part of the directions?

A Or a part of his directions.

Q Could you give us an example, looking at paragraph 5C, of how the noise abatement procedure described in paragraph 5C was worked out or used at Hollywood-Burbank Airport?

A Yes. As stated in the paragraph, traffic and weather permitting the aircraft would be assigned Runway 25 for departures of the turbined-powered aircraft between the hours of 2300 to 0700 local.

Q At what point in the communication between the [210] tower and the pilot would such an assignment be made?

A When he would be receiving the instrument flight rule clearance, that would be a part of the clearance.

Q So between those hours the tower would tell the pilot to take off on Runway 25 rather than other runways?

A Yes, sir.

THE COURT: You say he receives a clearance. Do you mean when he is out there waiting for the clearance and his passengers are aboard and he is ready to go, is that when he gets it?

THE WITNESS: Normally he calls for the clearance, your Honor, after the cabin door has been shut and he is assured that everyone is on board. He starts engines about that time and the copilot or first officer would be calling for it.

THE COURT: Before he gets in line they tell him then which runway to use?

THE WITNESS: That is correct, sir.

THE COURT: Then he taxis to the runway?

THE WITNESS: Yes, sir.

BY MR. CHRISTOPHER:

Q One last question for clarification.

The word "clearance" is used frequently by the men who have been in the controller business for some time. Would you define that or explain that to us, Mr. [211] Freiman?

A Yes, sir. Basically a clearance is an instruction to a pilot to do whatever the clearance calls for. Our procedure is to say that ATC clears and then spell out exactly what we want the pilot to do. Those are really instructions, is what they are.

MR. CHRISTOPHER: You may examine.

THE COURT: Cross-examine.

MR. SIEG: No questions, your Honor.

[212] THE COURT: I just have one question. It is probably not too material to the case, but you said the pilot sends in his flight plan.

As I understand it, the flight plan indicates when he is going to arrive, does it?

THE WITNESS: It normally does not indicate when he is going to arrive, your Honor.

THE COURT: It does not?

THE WITNESS: It indicates when he is going to depart.

THE COURT: When he is going to depart. All right. I see.

Then, by your computer you determine whether there is a conflict?

THE WITNESS: No, sir, not at this point. At some later time the computer will do this.

Right now we are merely processing flight plan information with our computer.

THE COURT: I see. You put the information in the computer.

THE WITNESS: Yes, sir.

THE COURT: Then later on, if there is a conflict how is it handled?

THE WITNESS: Again that will come at a later date. The conflict now is handled manually by the controller. [213] He recognizes this.

THE COURT: I see. Thank you.

Anything further?

MR. CHRISTOPHER: Nothing further, your Honor.

THE COURT: All right. Thank you, Mr. Freiman. May Mr. Freiman be excused?

MR. CHRISTOPHER: Yes.

THE COURT: All right.

(Witness excused.)

THE COURT: Your next witness. We will take a few minutes.

MR. DAU: We will call Mr. James Mitchell.

JAMES L. MITCHELL,

called as a witness by the intervening plaintiff, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated.

Will you state your name, please.

THE WITNESS: James L. Mitchell.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. DAU:

Q Mr. Mitchell, what is your present residence address?

[214] **A** No. 2 Coach Road, Rolling Hills, California.

Q What is your present position, sir?

A I am staff vice president of corporate planning, Continental Airlines.

Q How long have you been so employed?

A For two years.

Q Prior to that, Mr. Mitchell, could you briefly sketch for us the other positions in the field of aviation that you have held?

A Yes. During World War II I was a flight test observer at Wright Field in Ohio.

Immediately after the war I went to work for Western Airlines in the sales division. Shortly thereafter I became the director of schedules, who sets up the flight schedules, and in 1950 I became director of research, in which position I prepared information for rate cases applied for by Western.

Q Would you tell us, please, what is involved in your area of responsibility now as staff vice president of corporate planning for Continental Airlines?

A Our responsibilities include over-all planning, both short range and long range, running from day to day scheduling to long range equipment programs, purchases of aircraft.

Q What kind of things do what you referred to [215] as day to day scheduling involve?

A Well, that involves the scheduling of aircraft on our various routes. That function is performed within our division.

Q Is Continental presently conducting any operation at Hollywood-Burbank Airport?

A Yes, we are.

Q When did you commence those operations?

A On August 29, 1970.

MR. DAU: May I approach the witness, your Honor?

THE COURT: Yes.

BY MR. DAU:

Q Mr. Mitchell, I am placing Plaintiffs' and Intervening Plaintiff's Exhibit 9 in evidence before you, which is the Certificate of Public Convenience and Necessity issued by the CAB to Continental.

Does that certificate spell out what your authority is to operate a route involving the Hollywood-Burbank Airport?

A Yes, it does.

Q Could you refer us to that portion of the certificate that makes that reference, or give that authority?

A The portion of the certificate involving the authority at Burbank is contained on page 3, under Section [216] 17.

Q Is that Section 17 sometimes referred to as a segment?

A Yes, it is.

Q So would your authority to operate at Hollywood-Burbank be pursuant to Segment 17 of Route 297?

A Yes, sir.

Q Is that authority recently granted?

A Yes, the authority was granted on the 12th of May, in accordance with the certificate here.

Q And was that as a result of a particular CAB investigation?

A Yes, it was. That was the result of the Pacific Northwest-Southwest investigation case.

Excuse me. May I correct that?

Q Yes.

A Pacific Northwest-California investigation case.

Q All right. Could you tell us what kind of aircraft Continental is presently flying into the Hollywood-Burbank Airport?

A Yes, we use exclusively Boeing 727-200 aircraft at Burbank.

Q Let me refer you to that portion of Exhibit 42 which contains your announcement of new service, and ask [217] you to identify those flights that Continental presently operates into and out of Hollywood-Burbank Airport.

A In the northbound direction we operate Flights 302, 304, 306 and 308.

And in the southbound direction we operate Flights 301, 303 and 309 through the Hollywood-Burbank Airport.

Q Could you tell us something about the destinations on those flights and where they are going and where they are coming from?

A Well, the flights operate in the south from the satellite airports of Ontario and Burbank through San Jose in the San Francisco Bay area.

THE COURT: This is south to north?

THE WITNESS: Yes, sir. To Portland and Seattle. And in the southbound direction they generally operate in the same manner.

THE COURT: Well, I am not quite clear.

You say they operate, not from Burbank, but from Ontario, northbound?

THE WITNESS: Some of the flights originate in Ontario—

THE COURT: Oh, originate.

THE WITNESS: —and operate through Burbank.

THE COURT: Through Burbank.

[218] THE WITNESS: Yes.

THE COURT: As scheduled here.

THE WITNESS: Yes, as scheduled here.

THE COURT: I see.

THE WITNESS: One flight originates at Burbank. All flights must proceed to Portland and Seattle or must originate in Portland and Seattle.

THE COURT: Maybe this would be a good time to adjourn. We will adjourn until tomorrow morning at 9:30, gentlemen.

(Whereupon, at 4:25 o'clock p.m., Tuesday, September 15, 1970, an adjournment was taken to Wednesday, September 16, 1970, at 9:30 o'clock a.m.)

[222] LOS ANGELES, CALIFORNIA, WEDNESDAY, SEPTEMBER 16, 1970. 9:30 A.M.

THE CLERK: 70-1075, Lockheed Air Terminal v. The City of Burbank; further court trial.

THE COURT: All right, Mr. Dau. You were examining Mr. Mitchell, I believe.

MR. DAU: Yes.

JAMES L. MITCHELL,

called as a witness on behalf of the intervening plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

DIRECT EXAMINATION (Continued)

BY MR. DAU:

Q Mr. Mitchell, yesterday afternoon when we concluded we were talking about the schedule flown on the new route from the Los Angeles area to Portland and Seattle.

Could you tell us generally what kind of marketing efforts are required to develop a new route such as this?

A Our main problem is to attempt to change the travel habits of the people who are now moving between the Burbank area and Portland and Seattle. We have embarked upon a massive marketing program which includes advertising through all media, television, radio, and newspapers, and [223] sales promotional material being mailed to the various large companies involved.

We have engaged in direct sales campaigns with a number of the general traffic managers in the area in an effort to advise them of our service, convenience of the availability of the service between Burbank and Portland and Seattle.

Q To this point in time since you instituted that service, have you received any indications of passenger demand?

A Yes, we keep records of the advance reservations which are made. These are called booking reports. They are passengers who booked passage for some future date. These bookings are going very well. In fact, we have exceeded our original anticipation.

Q Is that true all along the route, at Hollywood-Burbank, or what is the situation?

A It is true all along the route. We have experienced excellent advance bookings in the Burbank area, in the San Jose area, and, of course, the return bookings in the Portland and Seattle areas. They all look very encouraging.

THE COURT: Where does that flight stop between Hollywood-Burbank and the Northwest, Portland and so on, do they stop at San Jose? Is that the only [224] stop?

THE WITNESS: No, sir, there are several flights.

THE COURT: You stop at various places.

THE WITNESS: Some operate nonstop to Seattle and nonstop to San Jose and then on to Portland and Seattle, and so forth.

BY MR. DAU:

Q Mr. Mitchell, are you familiar with the concept of satellite airports?

A Yes, I am.

Q What is your understanding of that term?

A Well, the term "satellite airport," which we like to refer to as neighborhood airport, is one which applies to an airport serving a community immediately adjacent to a major metropolitan area, which also has a major airport facility.

Q Would you identify for us the satellite airports in the Los Angeles area?

A In the Los Angeles area for interstate commercial air transportation, the airports that are considered to be satellite or neighborhood airports are Long Beach, Santa Ana, Ontario, and Hollywood-Burbank.

Q Are there any other areas that have satellite airports such as we have here in Los Angeles?

[225] A Yes, the best example is San Francisco where Oakland serves as a satellite airport. San Jose Airport also serves as a satellite airport.

There are others. Washington, D. C., is provided with service through two airports. They don't exactly meet my definition, but they are sometimes referred to as satellite airports. Newark, for example, is a satellite airport of New York.

Q Have you had any prior experience with investigating the service potential at satellite airports?

A Yes, I certainly have. During the years I worked for Western Airlines one of the my responsibilities was endeavoring to find new opportunities for air traffic for Western Airlines, and in the course of those studies, why, we studied very carefully the airport service at Oakland, at San Jose, at Burbank and Ontario, Santa Ana, Long Beach and even Van Nuys. Some of these studies eventually caused Western to provide service and Western for a number of years was the only major carrier providing service at such points as Ontario and Oakland and Long Beach.

Q I take it you also investigated service potential — Pacific Northwest in the California investigation of satellite airports.

A Yes, in that CAB proceeding I was working [226] for Continental Airlines at that time, and we investigated the potential traffic available through all the satellite airports I have named and did propose service to all of those satellite airports.

Q Are you aware of any CAB policy with respect to satellite airports?

A Well, for many years the Civil Aeronautics Board merely authorized service to a city, for example, the City of Los Angeles. The carrier then would iden-

tify the airport through which it desired to serve the City of Los Angeles, and by merely filing an airport notice was authorized to serve Los Angeles through that airport.

About ten years ago the Civil Aeronautics Board received from the air carriers, as well as the neighborhood cities involved, applications to provide service directly through the satellite airports. Since that time the Civil Aeronautics Board has changed its policy in many cases, although not in all, and actually identifies the airport to be served rather than the city to be served.

Q Was that policy followed in the Pacific Northwest-California investigation?

A Yes, it was. As a matter of fact, one of the primary issues in that case was the question of added satellite city service between the satellite cities [227] in the State of California and Portland and Seattle.

Q What is the reason behind this CAB policy to provide service at satellites?

A Well, I think there are probably two reasons. The one which probably caused the Board to look at the airport situation more carefully was that of airport congestion and ground congestion surrounding the major airports. This is a way of alleviating congestion at Los Angeles International Airport and at San Francisco International Airport.

The second reason, of course, is that cities the size of Long Beach and the size of Burbank, were it not for the fact they were immediately adjacent to Los Angeles, would be of sufficient size and economic power to justify their own air service. And the service through those neighborhood airports provides a far more convenient service to the populace surrounding the airports.

Q As a result of your experience in investigating the service potential at satellite airports, could you tell us what the advantages of the satellite airports are to passengers using that airport?

A Well, the primary advantage, of course, is that of proximity. Passengers living within the valley area can use the Burbank Airport with about a 10- or 15-minute driving time involved, whereas to Los Angeles [228] International Airport it would be about a 45-minute drive.

The freeways and highways, of course, are more congested. There is also a corollary problem, that being parking facilities and costs, and many times at the satellite airfields, for example, at Long Beach, there is no parking charge and adequate parking space, whereas at Los Angeles International Airport there are some very critical parking problems at certain times.

Q Does the institution of service at satellite airports provide any advantages for passengers who are still using the hubs or international airports?

A It would provide the advantage of alleviating the congestion, both on the surface and in the air surrounding the major metropolitan airports.

Q Do these advantages that you have described generally apply to the Hollywood-Burbank Airport?

A Yes, sir, they certainly do.

Q In connection with the Continental's proposal to the Civil Aeronautics Board in the Pacific Northwest-California investigation, did you rely on any studies that indicated the kind of passenger demand you would find at Hollywood-Burbank Airport?

A Yes, we did. The air traffic at the Hollywood-Burbank Airport is not reported in the Civil Aeronautics Board origin-destination figures for passengers moving to [229] Portland and Seattle.

Q Why is that?

A That is because there isn't any air carriers serving the Hollywood-Burbank Airport and Portland and Seattle. The majority of passengers who reside in the Burbank area drive to Los Angeles International Airport for their journey to Portland and Seattle.

For that reason we had only the traffic pool reported by the Civil Aeronautics Board of traffic in the Los Angeles area as a total bound for Portland and Seattle. We then had to allocate that total traffic pool to determine what proportion of that traffic we might anticipate out of Hollywood-Burbank and Long Beach and the other satellite airports. In order to do that we relied upon a study conducted by a consulting firm of Landrum & Brown, who did in fact survey passengers on arrival and departure at Los Angeles International Airport to determine their local origin within the city. They then plotted those on maps and set up definitions of minor areas, and by using those we were able to determine—for example, they showed that 20 percent of the passengers surveyed resided or were destined to a point closer to the Hollywood-Burbank Airport than to the Los Angeles International Airport. We then applied that 20 percent to the total traffic pool at Los Angeles to gain the total traffic potential [229-A] which we might expect between the Burbank Airport and Portland and Seattle.

[230] Q Now, are any of your flights on the Portland-Seattle route presently in violation of the Burbank curfew ordinance?

A No, they are not.

Q Does that Burbank curfew ordinance presently affect any plans you might have to develop that route?

A Well, at some time as the traffic would build up to a certain level Continental Airlines would anticipate adding another flight to the Pacific Northwest through the Burbank Airport. The normal time period in which that flight would be added would be at about 8:00 p.m. This gives us a spread through the day of morning, noon, evening—or dinnertime flights and after dinner flights.

The curfew at Burbank would restrict our ability to operate a southbound flight out of Seattle at that hour of the day.

Q What is the latest time that you could operate a southbound flight from Seattle as a result of the Burbank curfew ordinance?

A The normal evening flight would operate from Seattle through Portland, San Jose to Burbank and on to either Ontario or be ferried to Los Angeles. A flight of that nature could not depart Seattle any later than 7:00 p.m.

So that the restriction here would restrict us to a 7:00 p.m. or earlier departure at Seattle.

[231] Q Now, you just mentioned the word ferry. Would you explain what you mean by that?

A Yes. Under the terms of our certificate we are not permitted to operate a flight serving Seattle and Portland and serving Los Angeles International Airport. We cannot carry passengers between Los Angeles International Airport and any point on this Segment 17 of our route.

Therefore, the flight, the southbound flight must terminate at either Burbank or Ontario and be ferried without passengers to the Los Angeles International Airport in order that the aircraft can be maintained under our normal maintenance program.

THE COURT: It has to be maintained at Los Angeles Airport and not at the Hollywood-Burbank?

THE WITNESS: Yes, sir. Our maintenance base is Los Angeles International.

THE COURT: I see.

THE WITNESS: And we have no facilities for maintenance at—

THE COURT: Hollywood-Burbank.

THE WITNESS: —Hollywood-Burbank.

BY MR. DAU:

Q Well, do you regard that fact that you can't operate a southbound flight after 1900 from the Portland-Seattle area as a restriction on your certificate of public convenience [232] and necessity issued by the CAB?

A We certainly do. The certificate contains certain restrictions imposed by the Civil Aeronautics Board, none of which involve time of day restrictions.

Q We also must face the fact that we have not only the authority to provide an adequate service, we have the obligation to provide an adequate service to the Hollywood-Burbank airport. A restriction of this nature would be a further restriction in addition to those imposed by the Civil Aeronautics Board on our ability to provide an adequate service not only at Burbank but at several of the other cities involved.

Q Well, what are the current restrictions that the CAB adds on your certificate for the Portland-Seattle to Burbank route?

A There are two restrictions which are contained in the certificate. The first restriction requires that all flights operated pursuant to that authority either originate or terminate in Portland or Seattle. In other words, we may not operate a flight from San Jose to Burbank. It must originate at either Portland or Seattle.

The second restriction is the one that I referred to a minute ago. We may not provide service to the Los Angeles area pursuant to that authority through the Los Angeles International Airport. The service must be provided [233] through one of the satellite airports of Hollywood-Burbank, Ontario, Long Beach or Santa Ana.

Q Now, what would be the effect on the available hours that you have in the day to fly on that route if Portland were also to institute a similar curfew?

A If Portland were to institute a similar curfew we would not be able to operate a flight from Burbank or Ontario northbound to Portland and Seattle after the hours of 7:00 p.m.

This is because it takes that long to get to Portland and depart then from Portland bound for Seattle. Therefore, the last flight of the day must not depart from the Burbank area later than 7:00 p.m.

To put it differently, a curfew in Portland will affect many services to many cities in the nation including Burbank. And the curfew at Burbank will affect many cities to which service is provided in the nation.

Q So if there were a curfew at both ends, one in Portland and one in Burbank, your flight would be restricted from operating between the hours of 7:00 in the morning and 7:00 in the evening; is that right?

A Yes, sir.

Q And that would be on a 11:00 to 7:00 curfew?

A Yes, sir.

Q Now, if there were a nationwide curfew on [234] takeoff—

MR. SIEG: If the answer is 7:00 a.m. to 7:00 p.m. in the evening, I do not believe that was the—

THE COURT: 11:00 to 7:00, you are talking about, aren't you?

MR. SIEG: 7:00 p.m. in the evening to 7:00 a.m. in the morning, I would assume.

MR. PACKARD: Let's have it read back.

THE COURT: What were the hours you were asking about?

MR. DAU: Well, let me put it another way, your Honor.

Q Mr. Mitchell, during what hours of the day would you be restricted from operating aircraft if there were an 11:00 p.m. to 7:00 curfew at Portland and one at Burbank as well?

A Well, we would be precluded from operating any services between the hours of 7:00 p.m. and 7:00 a.m. operating between Seattle and Burbank.

Q To put it another way, you would be allowed to operate only between 7:00 a.m. and 7:00 p.m.; is that right?

A Yes, sir. Our day would be restricted to twelve hours.

THE COURT: If at both ends?

THE WITNESS: At both Portland and Burbank, yes.

[235] THE COURT: You would be restricted by six hours—let's see, seven—you are restricted by eight hours with it being at one end. The Burbank restriction.

THE WITNESS: Yes. The Burbank restriction standing alone.

THE COURT: 11:00 to 7:00 is eight hours.

THE WITNESS: Yes, sir.

THE COURT: Yes.

THE WITNESS: But a southbound flight—

THE COURT: I understand. I understand. If it's at both ends it is restricted more hours, twelve hours. All right.

BY MR. DAU:

Q Now, if there were a nationwide curfew on take-off instituted, how many flights under Continental's present schedule would be in violation of that curfew?

A We have 48 departures on our September schedule which would fall within the curfew hours in which we could not operate under that curfew.

Q Is that every day?

A Yes, sir.

Q Could you tell us something about what kind of passenger service Continental provides between the hours of 11:00 p.m. and 7:00 a.m. local time nationwide?

A Well, we operate regular services the same as [236] we would operate in the daytime. However, we have a tariff which permits standby adult passengers to be carried on the late night flights. This is not only true of Continental Airlines but of other air carriers.

Obviously the standby passenger traffic would not be available if we did not have the late night flights or the late night departures.

These are operated pursuant to Board Authority as a result of economic determinations that off-peak flights, flights which operate during off-peak hours can be sustained at a lower level of fares.

Passengers would, therefore, not have available to them the standby adult tariffs.

THE COURT: It varies with the time of day the plane leaves?

THE WITNESS: There is a special fare restricted to late evening operations.

THE COURT: What hours are we talking about when we say late evening?

THE WITNESS: Well, they are shown on the schedules which we filed and on the schedules which are included in the exhibits here. They are identified with the letters KU at the top.

THE COURT: But what hours?

THE WITNESS: Basically between 9:00 p.m. and, [237] oh, about 4:00 in the morning.

THE COURT: All right. Go ahead.

THE WITNESS: Because they are off-peak flights we do carry passengers on a standby basis without reservation at a much lower than normal fare. So that these night flights do carry a large proportion of those passengers.

They also carry military standby traffic in large proportions. During some times of the year under our youth standby tariff, for example, at Christmastime and at times when school is opening or closing, the night flights have many, many youth standby passengers.

BY MR. DAU:

Q: Could you tell us to what extent your mail and freight operations are carried on at night?

A: Well, airmail and air freight generally is accumulated throughout the day, dispatched to the airports, arriving at the airports in the area of 10:00 to 11:00 o'clock at night and carried by the air carriers in the night hours.

So that the large proportion of Continental's airmail and air freight is carried at night.

As a matter of fact, on September 14th we instituted our first all-cargo service using aircraft which carry no passengers but carry cargo and mail during the

[17-A] midnight hours. They are also shown on the aircraft routing diagram which is an exhibit.

(238) Q In scheduling flights is one of your goals maximum aircraft utilization?

A Yes, it is. It is a very important factor in producing an efficient economic service. You must use your facilities to maximum advantage, and therefore we try to fly our aircraft as much as possible and obtain as high a daily average utilization of those aircraft as we possibly can.

Q What kind of daily average utilization does Continental have on its domestic routes?

A On its domestic routes Continental Airlines utilizes its aircraft approximately nine to nine and a half hours, depending upon the time of the year, and in so doing it attains one of the highest utilization rates in the industry.

Q How do you measure that time? When you say nine to nine and a half hours, to what are you referring?

A Those are hours in the air of the aircraft, from the time the wheels leave the runway to the time the wheels touch the runway.

Q That is measured in a 24-hour period, is it?

A Yes, sir.

Q Now, would you describe for us how the scheduling of aircraft is geared to the maintenance operation.

A Well, maintenance is a very complicated subject because each component part of an aircraft, the engines, for example, and each component of the engines, is on a timed maintenance basis and must be returned to the major maintenance base for either inspection or for regular maintenance work.

THE COURT: How often? Any particular time schedule?

THE WITNESS: Every item is on a different time basis, sir, and it is very difficult to explain the maintenance problems simply. The fact of the matter is that we must operate our schedules in such a manner to insure that each aircraft can be called back into the maintenance base every day or at the most every two days.

THE COURT: You have maintenance facilities in the Northwest as well as in Los Angeles?

THE WITNESS: There are certain types of maintenance, a walk-around inspection program, for example, which is—

THE COURT: Not mechanical maintenance.

THE WITNESS: But not really mechanical maintenance. All our mechanical maintenance is at Los Angeles.

THE COURT: All right.

[240] THE WITNESS: For the type of aircraft involved in this proceeding.

THE COURT: Yes, the 727's and 737's and DC-9's?

THE WITNESS: That is right. We do some maintenance on some of our DC-9 aircraft in Denver, sir.

THE COURT: I see. They wouldn't be used on this flight.

THE WITNESS: That is right.

MR. DAU: May I approach the witness, your Honor?

THE COURT: Yes.

BY MR. DAU:

Q Mr. Mitchell, I would like to place Exhibit 51 for identification before you.

Could you tell us what these two pages are referred to?

A. These two pages, which are entitled "Daily Planning Diagram," are copies of Continental Airlines' present aircraft routing diagrams. These show each aircraft, where they go and when, throughout a 24-hour period.

Q. Now, one of them is labeled "Boeing" and the other is labeled "DC-9". Will you describe what that indicates?

A. Yes. All the aircraft routings on the [241] one which is indicated as Boeing are Boeing type aircraft. On Continental Airlines they are the Boeing 707-300C Boeing 720-B and Boeing 727-200. These aircraft are operated interchangeably over our system and the routing diagram shows all 48 of those aircraft.

The DC-9 routing diagram shows only the DC-9 aircraft in our system.

Q. All right, sir. Now, there are certain times indicated in the left-hand and on the extreme right-hand side of the page. Will you tell us what they indicate?

A. Yes, this diagram commences at the top of the page, just after midnight at 0001 hours and continues through the 24-hour clock to the bottom of the page at 2400.

Q. All right, sir. Now, there are some three-letter designations written across the top of the page and across the bottom of the page. Will you tell us what these stand for?

A. Those are standard airline codes for various cities on Continental's system.

THE COURT: There is Ontario, Burbank, San Francisco, Oakland—what is PDX?

THE WITNESS: Portland.

THE COURT: Portland.

[242] BY MR. DAU:

Q And to finish that out, SEA would be Seattle, is that right?

A Yes, sir.

Q And on the left-hand side of the page LAX would refer to Los Angeles International?

A Yes, sir.

THE COURT: And Denver and what is ORD?

THE WITNESS: ORD is Chicago. It is a strange code, but it stands for O'Hare Field.

THE COURT: I see.

BY MR. DAU:

Q Maybe it would be helpful, Mr. Mitchell, for you to identify the main routes shown on the Boeing Exhibit there and tell us what the airport codes stand for on those routes.

A Well, starting at the left—

THE COURT: Are we talking about Boeing now, the Boeing chart?

THE WITNESS: Yes, sir, the Boeing chart.

Starting at the left along the top you will see the codes LAX for Los Angeles, ONT for Ontario, BUR for Burbank, SJC for San Jose, OAK for Oakland, and PDX for Portland, and SEA for Seattle.

Now, this segment of this routing diagram [243] sets forth the aircraft as they are routed up and down the West Coast on our Segment 17 between the Los Angeles area and Seattle.

BY MR. DAU:

Q Now, some of the airports on that segment are shown as a line and two of them, like Los Angeles and Seattle, appear as a wider block. What is the reason for that?

A The reason for that is simply conservation of space on the routing diagram. At LAX we do have aircraft that turn around. We have aircraft on the ground for long periods of time, and therefore we have a block so that a line depicting the aircraft can move inside that line.

At Ontario and Burbank, since in the main aircraft stop there and continue on to some other point, we merely show a vertical line to represent that city. If the aircraft stops there the line depicting the aircraft has a large dot on it so you can see that it stops there. The same is true at Seattle. It is a larger base where we have many aircraft and therefore we have a wide block to permit us to show each aircraft.

Q Now, are all lines shown on the chart in local times?

A Yes, all times are local times, whether they [244] be Daylight Saving or Standard.

Q Would you pick up the line for us which is identified on the Ontario-Seattle route as 302, and start with the first movement in the morning and follow it through the day and describe for us what that line indicates?

A Yes. At the top of the page in the LAX block you will see a line that represents an aircraft. That line then during the hours from 0001 until 0700 remains in the LAX block. This means, of course, the airplane is on the ground at Los Angeles International Airport.

Shortly after 7:00 a.m. you will see that the line continues, is marked FRY, which stands for Ferry and shows a dashed line to the line representing Ontario International Airport. At that point the aircraft gets on the ground again at Ontario for about 30 min-

utes and begins the departure of Continental flight 302. It departs from Ontario at about 8:15. It makes a stop at Burbank, with the black dot indicating that stop at about 9:00 a.m.

It then proceeds northward to Portland, making a stop at Portland shortly after 11:00 a.m. and arrives at its destination, Seattle, at approximately noon. It is identified there again as Flight 302 so it can be easily followed.

[245] The aircraft then remains on the ground for about 45 minutes and departs from Seattle as Continental's Flight 305 at about 12:30. It proceeds to San Jose where it makes a stop shown by the black dot and continues on back to Ontario, arriving at Ontario at about 1530, 3:30 in the afternoon.

[246] The aircraft then remains on the ground at Ontario, being serviced for its departure of Flight 309—excuse me—308. 308 is shown departing at about 1645 from Ontario, making a stop at Burbank, at near 6:00 p.m. continuing to San Jose, making another stop there at about 7:00 p.m.

It proceeds to Portland, making a stop at Portland just before 9:00 p.m. It arrives in Seattle at 9:30 approximately, and remains on the ground in Seattle.

So that aircraft commenced its day's work in Los Angeles, flew a flight to Seattle via various intermediate stops, returned to Ontario and then returned back to Seattle and remains overnight to commence an operation at Seattle in the morning.

Q Where would that aircraft take up the next morning on the diagram?

A The same line that is shown at the bottom of the page in the Seattle block depicting that airplane is found again on the 0001 at the top of the page at Seattle.

That line may be followed in the identical manner as I just described. It remains in Seattle overnight and commences the operation of Flight 301 at Seattle at about 7:30 in the morning.

Q Moving across the page, then, from Seattle, what is the next route flown by Continental?

[247] A The next route to the right there of Seattle block is a route which we operate between Seattle and Portland through Denver into cities in Oklahoma, Texas and on to New Orleans.

New Orleans is shown by the code letters MSY and is approximately in the middle of the page here.

Q Now, between the Seattle abbreviation which you have previously identified as SEA and New Orleans as MSY, what are the other abbreviations that are shown at the top of the page?

A PDX is, again, the code for Portland. DEN is the code for Denver. ICT is Wichita. OKC is Oklahoma City. TUL is Tulsa. IAH is Houston. MYS is New Orleans.

Q Now would you pick up there in New Orleans and identify the abbreviations across the rest of the page there for us?

A Yes. SAT stands for San Antonio. HNL for Honolulu. ITO is Hilo, Hawaii. DAL is Dallas. ELP is El Paso. ABQ is Albuquerque. TUS is Tucson. PHX is Phoenix. SFO is San Francisco. LAX is repeated again here for convenience and represents Los Angeles.

ONT is repeated again because it is served on another route by Continental Airlines. ONT stands for Ontario.

DEN is also repeated as Denver. COS stands [248] for Colorado Springs. MKC stands for Kansas City. ORD stands for O'Hare Field in Chicago.

Q So the route at the right-hand side of the page, then, from LAX to ORD would be your Los Angeles-Chicago route with the various stops indicated along that line?

A Yes, sir.

Q Now, there are a number of dots circled in red at both the top and the bottom of the page on the Boeing diagram as well as on the page with the DC-9 diagram of Exhibit 51. What do the red circles indicate?

A The red circles indicate departures of those particular flights between the hours of 11:00 p.m. and 7:00 a.m.

Q Those are departures that would be in violation of the nationwide 11:00 to 7:00 curfew; is that correct?

A Yes. That's correct.

MR. SIEG: May I interject at this point and on voir dire ask just to understand this, your Honor?

Are you saying, Mr. Mitchell, that between the two red lines, the flights between those lines would be in violation of a curfew ordinance?

THE COURT: The flights above and below. Isn't that what you said?

THE WITNESS: Yes, sir.

THE COURT: That's what he testified to.

[249] MR. SIEG: The record I don't think will show that, your Honor. That's why I interrupted.

THE COURT: Well, he said that the ones circled in red were the ones that were before 7:00 and after 11:00.

THE WITNESS: Yes, sir; that's what I intended to say.

THE COURT: Well, it is cleared up now.

MR. SIEG: Yes.

BY MR. DAU: Those movements that are circled are takeoffs only, is that correct?

A Yes. That's correct.

Q Now, I take it the red line across the page at 7:00 a.m. and the one at 11:00 p.m. is merely to identify the curfew hours?

A Yes.

Q You previously testified, Mr. Mitchell, that the Burbank curfew would prohibit flying southbound from Seattle after 1900. Is that indicated on the exhibit?

A Yes, it is. It is indicated at the bottom of the Seattle block with a—an arrow pointing downward stating no departures after 1900.

Q And what—

A The Burbank curfew would prohibit departures [250] at Seattle after 7:00 p.m.

Q That's a green line; is it?

A Yes, it is.

THE COURT: There is one there that looks like you have circled it and technically it shouldn't have been circled.

THE WITNESS: I should probably explain that. This route diagram is a depiction of where the aircraft go and approximately what time. That particular arrival happens to be before 11:00 p.m. and the departure is after 11:00 p.m.

BY MR. DAU: Would you identify, Mr. Mitchell, which one

you are speaking of now?

A Flight 424. Its arrival at Houston is before 11:00 p.m. Although the line shows a departure slight before 11:00 p.m., it is at 11:00 p.m.

Q Now, what would be the effect of a nationwide curfew on the available hours for your Seattle to New Orleans flight?

A A flight such as Continental's Flight 430 operating from Seattle through Denver, Wichita, Tulsa, Houston to New Orleans could not be operated from Seattle at any time after 2:00 p.m. because if it did its departure time at Houston bound for New Orleans would be in violation of the [251] curfew at Houston.

Q Obviously that flight could not operate before 7:00 a.m. in the morning?

A That is correct.

Q All right. Would you describe for us how you have figured that that flight could not operate after 2:00 p.m. or 1400 in the afternoon?

A If you move the flight time of that flight to the point where its departure at Houston is just prior to 11:00 p.m. thereby making it legal or not in violation of the curfew, it would have to depart from Seattle at 2:00 p.m. It takes that long to get there.

Q All right, sir. What would be the effect on such a nationwide curfew between 11:00 and 7:00 on your flight from Los Angeles to Chicago? What available hours would you have to operate that flight?

A A flight in our normal Los Angeles-Chicago pattern stopping at Denver could not depart any later than 4:15 p.m. from Los Angeles.

Q Nor could it operate before 7:00 a.m. in the morning?

A Nor could it operate before 7:00 a.m. in the morning, correct.

Q Well, why is it that the curfew, an 11:00 to 7:00 nationwide curfew can affect different flights by [252] providing a variety of available hours that you

operate? In other words, why can't you—why is the Seattle to New Orleans restriction from 7:00 am to 1400 in the afternoon whereas from Los Angeles to Chicago it's between 7:00 a.m. and 4:15 in the afternoon?

A Well, all of these vary depending upon the intermediate stops made.

THE COURT: It's the time element all the way through?

THE WITNESS: The time element all the way through the flight, yes.

THE COURT: Which varies with the number of stops you make as far as going from here to Chicago?

THE WITNESS: Yes.

THE COURT: Or from here to Seattle?

THE WITNESS: That's correct. It varies depending upon where you are going, what time zones you cross. Because the time zone gets involved also. I am assuming that the curfew would be local time.

THE COURT: Yes.

THE WITNESS: And, therefore, time zones play a very important part in a nationwide curfew.

So that the time zones, the distances, the direction and the number of intermediate stops involved would all render most flights in the nation having a different [253] operating period of the day in which they could operate. And this is what we have demonstrated here. Depending upon the flight, where it is going and what it is doing it will have a different individual curfew.

BY MR. DAU:

Q Now, if you are crossing time zones, does that have a greater effect than a particular segment like Los Angeles to Seattle where you don't cross time zones?

A Well, it has the effect as you cross the time zone eastbound of adding an hour to your flight time.

Q Thereby restricting by another hour the available hours that you can operate that flight?

A Yes, sir.

THE COURT: The other way would give you more time, so it would balance out?

THE WITNESS: Yes. That is correct.

BY MR. DAU:

Q Now, you have indicated various times. For instance, on the Seattle to New Orleans flight you couldn't operate after 2:00 in the afternoon. Could you actually schedule a flight at 2:00 in the afternoon if there were an 11:00 to 7:00 curfew in Houston?

A Well, we would not schedule a flight at 2:00 in the afternoon. We would probably schedule it at about 1:00, or no later than 1:30 for the reason that we would not [254] want that flight even on an occasional basis to suddenly encounter a curfew at Houston as the result of a weather problem if the flight is delayed or any other type of problem that it may encounter along its way.

We have significant economic penalties when we encounter that kind of a situation and have to over-fly, for example, Houston, carry the passengers on to New Orleans and then transport them at our expense by ground or some other means back to Houston. This is a very expensive undertaking.

Q Could that also have an effect on your—say, you were held in Houston, could that have an effect on your maintenance scheduling?

A It could have an effect on the maintenance schedule. It could have an effect on the immediately ensuing schedule of an airplane. If it doesn't get where

is going, it cannot commence the next flight. This thing pyramids through the day.

Q What would be the effect of a nationwide 11:00 to 7:00 curfew on Continental's ability to provide adequate service as those terms are used by the Civil Aeronautics Board in issuing your certificate?

A Well, there are many factors involved in the provision of adequate service. We have the obligation to perform airmail service, freight service and passenger [255] service.

One example in terms of passenger service, for example, is that at the present time with the high degree of oil activity in Alaska and the North Shore there is a substantial movement of traffic between Alaska and the oil centers in Oklahoma and Texas and Louisiana.

[256] There are three daily services between Anchorage and Seattle; one provided by Northwest and one by Alaska Airlines, and the other by Western Airlines, which arrives in Seattle at 11:30 p.m.

We carry significant quantities of passengers moving from Anchorage into the Texas area. On the flight which is shown on this routing diagram, Flight 430, which leaves Seattle at about 1:00 a.m. and operates down into the Oklahoma-Texas area, so that those passengers would be precluded from gaining service at that hour of the day. This is the most used service for Alaska-Texas travel today.

Q And in scheduling flights such as 430, do you take into consideration the connections other airlines provide into the originating city?

A Absolutely. In our domestic system about 30 percent of our business comes as a connection from other carriers. In the case of this particular flight a very high proportion of it comes from Alaska connecting

with these three carriers. It also carries a large amount of airfreight in the oil business between Alaska and Texas—excuse me, that is in the reverse direction, between Texas and Alaska.

Q Now, at my request did you look into the situation and make a study to determine what Continental could do in the event of a nation-wide curfew as the least [257] onerous way to meet that restriction?

A Yes, we undertook a study to determine what we in fact would do, because in scheduling aircraft there are several alternatives available. So we engaged in a study to determine what we really would do if this curfew were imposed nation-wide. This involves cancellation of a number of flights, changes of certain flights to await curfews and so forth.

Q What is the minimum number of flights you would have to cancel under a nation-wide 11:00 to 7:00 curfew?

A We would cancel approximately 15 percent of our aircraft miles flown, which would be in excess of 30,000 miles a day. This would be the minimum.

Q And did you make a list of the minimum number of flights you would have to cancel if you were operating against such curfew?

A Yes, I did.

MR. DAU: May I approach the witness, your Honor?

THE COURT: Yes.

Has this presently an exhibit number?

MR. DAU: Well, it does not at this time, your Honor. We apologize for that. We didn't have it in time.

[258] Q I have handed you a document entitled "Continental Airlines Minimum Cancellation Required by 2300-0700 Nationwide Takeoff Curfew".

Mr. Mitchell, is that the list to which you just referred?

A Yes, it is.

Q How many flights would have to be canceled, according to your list, as a result of this curfew?

A The list indicates 28 flights. I should say that some of these flights are not canceled in their entirety.

Q But the daily aircraft miles that you have indicated there would be canceled each day, is that right?

A Yes. In explanation, if I may, the first flight listed there, Flight 420, operates from Seattle clear down to New Orleans. In attempting to adjust ourselves to this sort of a situation we have tried to mitigate the amount of cancellations. As I said, this is a minimum number of cancellations, and those flights we canceled only between Portland and Seattle, Flights 420 and 429. This, of course, would eliminate some Seattle service. Our service pattern would not be as good as it is and there are many passengers who would have to be inconvenienced. But this is the type of thing we would do in order to keep from having to cancel the entire flight [259] all the way to New Orleans. That is why I say this is a minimum cancellation.

Q All of these cancellations you have listed here are on nighttime or curfew-hour flights?

A No, they are not.

Q Would you explain why that occurs?

A Well, among the cancellations here, for example, are two night flights. They are shown on this

list as Flight 66 and Flight 56, which operate from Los Angeles to Houston. Now, those two flights must be canceled in that direction. In order to balance our aircraft we must cancel a return flight as well. The return flights we have chosen here to cancel are those which would be last onerous to us, and they are indicated with an asterisk showing cancellations which are required in order to get our aircraft back into balance. Otherwise, we would end up in six or seven days with all our airplanes in Houston.

Q That would be Flights 109 and 65?

A Yes, Flight 109 was the balance for Flight 66, and Flight 65 was the balance for Flight 56, and both Flights 109 and 65 operate in the daylight hours.

Q What would be the effect of a nation-wide 11:00 to 7:00 curfew on Continental's freight and air-mail operations?

[260] A Well, since the majority of our—

THE COURT: Didn't you go into this? Didn't you say it was all shipped at night?

THE WITNESS: Yes, sir.

THE COURT: He has testified to that, hasn't he?

MR. DAU: Well, he testified generally that most of that material moves at night, your Honor. We haven't gotten into specifically down to the effect on the airlines of the cancellation list he has prepared here.

THE COURT: It certainly would include any of those planes, wouldn't it?

THE WITNESS: Yes, sir.

THE COURT: You want to ask him how many there are? Is that what you are getting to or leading to, or what? I don't want to repeat, now. I don't want to start over again on the portions he has covered.

MR. DAU: Yes, your Honor.

Q What percentage, Mr. Mitchell, of your cargo flights, for instance, would you lose as a result of the cancellation list you prepared?

A Well, all of our flights carry both passengers and cargo, with the exception of the new cargo flights originating on September 14th, so the percentage would be the same. The percentage of miles would be 14.9 percent. [261] But it would be at the time of day when the vast majority of the cargo airfreight and air-mail by Continental Airlines is carried.

Q Did you attempt to compute the percentage of increase in your operating costs that you would incur if you were facing a nation-wide 11:00 to 7:00 curfew?

A We would expect our operating costs to increase in the neighborhood of 25 percent, if we were to be faced with a nation-wide curfew of this sort.

Q What are the major factors that would cause this increase?

A Well, the biggest single factor is inefficiency. We are able to utilize our capacity at night when it is otherwise standing idle in flying a good many of these services. In order to replace those services during daylight hours we would have to purchase approximately six new Boeing aircraft at a cost ranging between five and seven million dollars each. These costs then would have to be borne by the daylight operations. Our efficiency would go down considerably, our aircraft utilization would go down and our personnel utilization would go down.

[262] In addition we would lose substantial quantities of aircraft revenues which are in the main carried at night and would probably not divert to daylight trips.

THE COURT: How many of the type of planes you were discussing, that we are discussing, does Continental have?

THE WITNESS: We have 53 Boeing aircraft, your Honor.

THE COURT: Of this type? Not 707, but of this type, this particular type.

THE WITNESS: Of the Boeing 727-200 we have 19.

THE COURT: That's the 727-200?

THE WITNESS: Yes, sir.

THE COURT: And how many DC-9's?

THE WITNESS: We have 19 DC-9's also.

THE COURT: Then 737?

THE WITNESS: No, we have no 737's.

THE COURT: All right. So that's a total of 38, isn't it? DC-9's and 727's 19?

THE WITNESS: Yes, sir. We have 19 DC-9's. And we 19 Boeing 727-200's. We have eight Boeing 720-B's.

THE COURT: Do you use those on these flights, on these routes?

[263] THE WITNESS: Over the system, but not into Burbank.

THE COURT: Yes, that's what I mean. Not into Burbank. All right. Go ahead.

BY MR. DAU:

Q How about 707's?

A We have 13 707-320's. I should modify that. Five of those aircraft are operated over our Military Air Command services across the Pacific and are not involved in our domestic operation.

Q And 747's?

A We have three Boeing 747's.

Q Has Continental Airlines been operating for the past several years at a rate of return that is considered adequate by the Civil Aeronautics Board?

A No, it has not. Our rate of return is considerably less than half of that which the Board has determined to be appropriate.

Q What would be the effect of the nation-wide 11:00 to 7:00 curfew on passenger fares?

A Well, in my view if all other carriers suffered as severely as we do—or as we think we would to the tune of a 25 percent loss, this type of a loss would be passed on. The only alternative we would have would be to pass that on in the form of fare increases.

[264] Q Resulting in a significant increase, I take it.

A Yes. I would think it would be in the same magnitude.

MR. DAU: At this time, your Honor, we would move the admission of Exhibit 51.

THE COURT: 51 is in evidence. 51 is in evidence.

MR. SIEG: No, it is not.

MR. PACKARD: I don't think so.

THE COURT: I have it marked.

MR. DAU: That's the daily planning diagram. We have not previously offered its admission.

THE COURT: I see. You are right. It is not. I don't have it marked. Do you have it marked, Mr. Byrne?

THE CLERK: Let's see.

THE COURT: I don't have it marked in evidence.

THE CLERK: No, I don't, either. I'm sorry.

THE COURT: 51 is ordered in evidence.

(Plaintiffs' Exhibit 51 for identification was received in evidence.)

MR. DAU: And may the list of minimum cancellations be attached to that exhibit as part of Exhibit [265] 51, your Honor?

THE COURT: Yes, there being no objection. This will be attached now to 51.

MR. DAU: You may cross-examine.

THE COURT: Cross-examine.

I believe now that all of the exhibits 1 to 51 are in evidence.

MR. CHRISTOPHER: 1 to 54.

THE COURT: 1 to 54, yes, 1 to 54 are in evidence, I believe. Is that right, Mr. Clerk?

THE CLERK: Yes, your Honor.

THE COURT: Yes, my notes indicate that.

MR. CHRISTOPHER: Thank you, your Honor. That is our indication, too.

THE COURT: Yes.

CROSS EXAMINATION

BY MR. SIEG:

Q Mr. Mitchell, you have indicated some familiarity with the decision of the Civil Aeronautics Board in connection with the Pacific Northwest-California investigation; is that true?

A Yes. I am generally familiar with it, yes.

Q And you read the decision?

A Yes, I have. At some point recently in May [266] when it was issued I am sure I read it.

Q Yes. I am referring at this time to Exhibit 35 in evidence. I believe that decision awarded to Continental not only Ontario, Burbank, but also Santa Ana and Long Beach, did it not?

A Yes, sir, it did.

Q Now, I note your schedule, the one that was admitted in evidence, shows no stops, either departures or landings, at Santa Ana or Long Beach.

THE COURT: That's Exhibit 51, is it? I want to be sure the record is clear as to what you are talking about.

MR. SIEG: The schedule?

THE COURT: Exhibit 51, is that the one we are talking about?

MR. SIEG: No, sir.

THE COURT: I just want the record clear as to what exhibit is being referred to.

MR. SIEG: The schedule that I have just referred to is Exhibit 42. It is the one-page schedule that shows the routing as described in that schedule, Burbank, Ontario, San Jose, Portland, and Seattle.

THE COURT: Do you need it to examine it?

THE WITNESS: No, sir.

THE COURT: All right. The question is, [267] now, that doesn't include the stop at Santa Ana and Long Beach; is that correct?

MR. SIEG: That is right, your Honor.

THE WITNESS: That is correct, it does not.

BY MR. SIEG:

Q Now, why have you not implemented service at Santa Ana and Long Beach in accordance with the permission granted by the Civil Aeronautics Board?

A The primary reason, sir, is that the Santa Ana Airport has a 95,000-pound weight restriction on its runways. As a result we are precluded from operating our Boeing 727's there.

Q Any other reason?

A Well, that, sir, is reason enough. We cannot operate there until that restriction is lifted.

Q All right.

A If it is lifted.

Q That's the only reason, then?

A Yes, we cannot operate our aircraft there.

THE COURT: What he is trying to find out is if you could operate there would you? Is there any other reason you wouldn't other than the fact of the weight restriction on your aircraft?

THE WITNESS: We have indicated a desire to operate there and wish to provide the service. We have [268] indicated that we are ready to provide the service. The matter of the restriction will have to be cleared up before we can operate there. At such time as it is, assuming that all other factors are clear also, why, we will be operating there.

MR. SIEG: All right.

Q What about Long Beach?

A Long Beach will be a stop on the Santa Ana service pattern in accordance with our proposed service.

Q Well, my question is why haven't you instituted service there?

A We have encountered some difficulties in getting authority to operate aircraft at Long Beach.

Q Would you be more explicit, Mr. Mitchell? What is the problem?

A Well, the problem is a political one, I would judge, within the City of Long Beach. In other words, the airport has no restrictions or no technical reasons why we could not.

Q In other words, your aircraft could land and take off there, the 727's?

A Yes, sir.

THE COURT: Who has to give you the authority that has not given it to you?

THE WITNESS: Well, we have, of course, to [269] negotiate leases for ticket offices and for other facilities at the airport and these things are in the process of negotiation, but they are being slowed down considerably.

THE COURT: Yes.

THE WITNESS: We are prepared to operate and we are desirous of operating there.

BY MR. SIEG:

Q But you haven't as yet overcome this opposition; is that true?

A No, we haven't. It hasn't anything to do with a crew, however.

Q No, I realize that. But you haven't succeeded in persuading the local authorities at Long Beach to accept your aircraft; isn't that true?

A That is true. We would not want to commence an operation which was not desired by the local community. After all, we need their support. We are a public servant.

THE COURT: When you say the local authority are you talking about the City Council? Who do you mean when you say local authority, Mr. Sieg? Do you have anything in mind?

MR. SIEG: I am not really inquiring. I would refer your Honor to—and maybe this will clear up what I am getting at—Exhibit 35.

THE COURT: Yes.

[270] **MR. SIEG:** And on page 13, last sentence of the paragraph at the top of the page—I have already brought out through this witness, as the court will observe from this ruling or order of the Civil Aeronautics Board, that Continental was in fact granted the right to use Santa Ana or, as described in here, Orange

County Airport, Long Beach Airport, Ontario, and Burbank.

Now, referring to the top of page 13 of the ruling or order, it states:

"Since cooperation of the local airport authorities will be needed before any service can be inaugurated, it will be up to the satellite carrier we have selected to convince these authorities that their expressed fears are exaggerated or are outweighed by affirmative considerations."

Q Now, the satellite carrier that is referred to in the paragraph that I just read is Continental, isn't it, Mr. Mitchell?

A Yes, sir. We have been designated as a satellite specialist in this area.

[271] THE COURT: And the authorities you are negotiating with are the airport authorities rather than the civil authorities?

THE WITNESS: Well, your Honor, I am not too well acquainted with it. I do know that the Councilmen have a—quite a debate involving whether they wish to have added air service at their airport.

THE COURT: It may not be so pertinent here, but the order indicates airport authority, it says airport authority. That is the reason I asked.

MR. SIEG: It says "local authority."

THE COURT: Doesn't it say anything about airport—

MR. SIEG: Yes, I am sorry, airport authority.

THE COURT: All right. Go ahead.

This may be a good time to take our morning recess. We will recess for about ten minutes.

(Recess taken.)

THE COURT: You may proceed, Mr. Sieg.

BY MR. SIEG: Q Mr. Mitchell, I have just referred to Exhibit 37 and read a portion from it, and I note that it was decided by the Civil Aeronautics Board, under date of May 12, 1970.

Up to that point I assume the issue was in [272] doubt or at least it wasn't sufficiently decided in your favor so that up to that point you made no preparations to implement any service in accordance with this particular route, would that be true?

A Yes, basically that is true. We had discussed the routing with some of the civic people in the various satellite airports, but until the decision was handed down we did not make any preparations for service.

Q Now, the record in this case shows that the ordinance in question here became effective on May 4th, a few days prior to this May 12th date.

May I ask you this: Had you up to that point made any contact with the Lockheed Air Terminal regarding use of the facilities of that airport prior to, let's say, May 12, 1970?

A I'm afraid I am not in a position to be able to answer that question, sir. I would doubt it, but there are other people who would make those contacts.

Q Prior to that time?

A Yes, sir.

Q In other words, you didn't personally participate in those initial discussions, is that correct?

A No, sir, I did not.

Q Did you at a later time participate in any discussions with Lockheed Burbank—with Lockheed regarding [273] the use of the facilities at the Hollywood-Burbank Airport?

A No, sir, I did not personally become involved in

Q All right. When did you first become aware of the fact that an ordinance of the type involved here, which you have described as a curfew, was in effect at the Hollywood-Burbank Airport?

MR. DAU: I will object to that question as being not relevant to any issue in this case.

THE COURT: I can't tell. This is cross examination, of course, and I am pretty liberal on cross examination. Objection overruled. It may well not be, but no one is going to be prejudiced, I don't think. Go ahead.

THE WITNESS: Well, I personally was not aware of this ordinance until perhaps two or three weeks ago.

BY MR. SIEG:

Q Two or three weeks ago?

A Yes, sir.

Q Do you know at this time what arrangements were made with Lockheed Air Terminal regarding the use of the Hollywood-Burbank Airport?

THE COURT: Arrangements by whom?

MR. SIEG: Arrangements between Continental—

[274] **THE COURT:** Continental?

MR. SIEG: Yes, sir.

THE WITNESS: Well, in the implementation of the new route, such as that, we have people in our facilities division who would insure the facilities are appropriate and—

THE COURT: He is asking you, do you know what arrangements were made.

THE WITNESS: No, sir, I do not.

THE COURT: He doesn't know.

BY MR. SIEG:

Do you know whether or not the arrangements which were made were reduced to written form, that is, an agreement between Continental and Lockheed Air Terminal, Inc.?

A No, sir, I do not.

Q You do not know that?

A No, sir.

Q Now, with respect to the—you have indicated in your previous testimony that you are using 727-200s at Burbank?

A Yes, that is correct.

Q And are you also using DC-9s?

A No, sir.

Q Just 727-200?

[275] A That is correct.

Q Who, in your organization, if you know, handled the arrangements with Lockheed Air Terminal, Inc., for the use of the facilities at Hollywood-Burbank Airport?

A As I indicated, we have a facilities division and I would certainly be someone in that division.

Q Do you know a particular person in that division?

A I know several people in the division. The head of the division is Mr. Richard Schorling, S-c-h-o-r-l-i-n-g.

MR. SIEG: Thank you. That is all I have, your Honor.

THE COURT: Very well. Any redirect?

MR. DAU: No redirect.

May Mr. Mitchell be excused?

THE COURT: Mr. Mitchell may be excused if there is no objection.

(No response.)

THE COURT: You may be excused, Mr. Mitchell.

THE WITNESS: Thank you, sir.

(Witness excused.)

THE COURT: Your next witness.

[276] MR. CHRISTOPHER: Call Mr. Von Kann.

CLIFTON F. VON KANN,
called as a witness by the intervening plaintiff, having
been first duly sworn, was examined and testified as
follows:

THE CLERK: Please be seated.

Will you state your name, please.

THE WITNESS: My name is Clifton F. Von Kann.

DIRECT EXAMINATION

BY MR. CHRISTOPHER:

Q Would you state your residence address for the
record, please?

A Yes. My residence is Apartment 1024E, 4201
Cathedral Avenue Northwest, Washington, D.C. 20016.

Q Would you tell us what your occupation and pro-
fession is?

A Yes. I am the vice president for operations and
engineering of the Air Transport Association of Ameri-
ca.

Q That's the largest division or section of the Air
Transport Association?

A Well, my department covers the fields of opera-
tions, including such matters as safety regulations, noise
matters, air navigation and traffic control, international
technical matters. It covers engineering and maintenance
as well as supply and purchasing.

We coordinate or work with the various airline
[277] committees in these areas helping to develop air-
line positions and act as spokesman for the airlines on
them.

Q Tell us briefly, Mr. Von Kann, of your educa-
tional background.

A Yes. I received my Bachelor of Arts degree
from Harvard College in 1937 and a Master of Business

Administration degree from Harvard Graduate School of Business Administration in 1948.

Q You went from the latter educational experience into the Army?

A No, I went into the Army as soon as I graduated from Harvard College in 1937. I was a military student at Harvard Business School.

Q Would you tell us the aviation positions that you held during the course of your Army career, Mr. Von Kann?

A Yes. From 1959 to 1961 for just about two years, I was the director of the Army aviation in the Army General Staff. As such I was the senior staff officer concerned with the Army aviation program.

My last tour from 1963 to 1965 I was in command of the Army Aviation School and Center at Fort Rucker, Alabama. During the period 1957 to 1965 I was an active military aviator.

Q So, Mr. Von Kann, your entire career from prior to 1965, from the time you left Harvard has been in the Army [278] and ending with high aviation positions?

A That's correct, sir.

Q Did you retire in 1965?

A Yes, sir.

Q And you retired at what rank?

A A major general.

Q Would you tell us briefly, Mr. Von Kann, what the purpose is of the Air Transport Association of America?

A Yes. The Air Transport Association is the trade association of virtually all the scheduled or certified scheduled route carriers which are commonly called scheduled airlines. There are 32 members.

In general the Association serves as a vehicle for the various committees and conferences in which the airlines discuss non-competitive matters, and in which they seek to achieve technical standardization.

It also serves as a spokesman for the airlines in dealing with the Government and other aviation organizations.

Q Among the members of the Air Transport Association is Continental Airlines?

A That is correct.

Q Air West?

A Yes, sir.

Q United Air Lines?

[279] A Yes, sir.

Q Western Airlines?

A Yes, sir.

Q But not PSA?

A No, sir.

Q Why would that be?

A Well, PSA is an intrastate carrier, and all our carriers are involved in interstate coverage and subject to CAB jurisdiction.

Q Speaking generally in terms of trends, Mr. Von Kann, what type of aircraft equipment is now being used by the members of ATA, the Air Transport Association?

A Well, the members of the Association fly approximately 2400 aircraft. Most of these are jet aircraft. There are something in the neighborhood of, oh, I would say about 650 four-engine aircraft of the 707, DC-8 type; roughly 1100 of the—oh, no. I guess it's nearer 1300 of the smaller jets, the two and three-engine types, including the DC-9's, the 737s, the 727s and the very small number of turbo-prop aircraft which are gradually being phased out of the fleet.

Q What does the future seem to hold with respect to aircraft equipment usage?

A Well, the aircraft are going through what might be called the third equipment cycle of the jet age.

[280] The first cycle was really bringing the four-engine jets into the picture. The second cycle was bringing the so-called short range jets, the two and three-engine jets, into the system. And now we are starting out a process of bringing the so-called wide body jets into the system.

There are 60 or 70 747s already flying. In the next three years the airlines will be taking delivery of maybe 250 or more of the so-called tri-jets. That includes the Lockheed 1011 and Douglas DC-10.

So that the fleet is now going into a new phase where larger capacity aircraft are being introduced so that the increase in passengers can be accommodated without a comparable increase in the numbers of operation.

In addition these new jets are quieter, more comfortable; they give the passengers a great deal more comfort. They involve the newest and best of technology. They will be more productive.

THE COURT: Is this what we read in the paper about jumbo jets?

THE WITNESS: Yes, your Honor.

BY MR. CHRISTOPHER:

Q Mr. Von Kann, speaking again in terms of trends and not holding you to a specific number, but what has been the trend in the number of passengers carried by the [281] air carrier industry over the last decade or any other set of years you may have in mind?

A Well, taking the decade from '59 to '69, there has been a very impressive growth in passenger traffic. In

1959 the members of the Air Transport Association carried something like fifty-six million passengers. That number in '69 had increased to something around a hundred and fifty-odd million passengers.

It has virtually tripled. At this point in time it can be said from a recent survey that half of the people in this country have flown in our fleet.

Q Mr. Von Kann, could you cite a comparable trend figure with respect to air cargo?

A Yes. The air cargo is, of course, a later developing part of the industry. Ten years ago the scheduled carriers lifted something less than a billion cargo ton miles, which is an expression involving moving a ton of cargo an air mile.

That included freight, mail and express, air express service.

In 1969 that figure had gone up from under a billion to approximately 4.7 billion cargo ton miles.

Q Mr. Von Kann, in your role as vice president of operations and engineering, is it your business to keep generally apprised of the financial condition of the air [282] carrier industry?

A Not in detail, but certainly I have to stay fairly generally briefed on what is going on, yes.

Q Could you describe or characterize what the present financial condition of the air carrier industry is?

A Yes, sir, I think I can in general terms. The financial condition is one in which the industry is sorely beset at this point in time. Would you want me to elaborate on that?

[283] Q Well, I think it would be helpful for you to state the background reasons as you may know them for the condition that now exists.

A Very well. As far as the condition itself, in 1969 members made a profit of only fifty-five million dollars on an investment of over eight billion dollars and revenue of over eight billion dollars.

In other words, this was less than one cent per invested dollar, certainly a far cry from the criteria announced by the CAB in 1960 indicating that a return of 10½ percent on investment would be a fair rate of return.

Q So the rate of return in the period you mentioned was 1 percent rather than the 10½ percent specified by the CAB?

A Oh, I think it's much less than that. I said less than one cent on a dollar invested. Well, it is well under 1 percent, yes. Yes.

Q Would you continue, then, Mr. Von Kann, indicating the reasons as you may know them for this financial condition?

A Yes, sir. The first and foremost consideration, I think, is that we are having something which might be called a recession in the economy. This has slowed down our rate of growth considerably.

The rate of growth was running at something [284] like 15 percent a year in the mid-'60s up to about '66 which, of course, is very, very significant growth. Right now the passenger growth rate is down somewhere I would say, in the 6 percent ballpark.

Now, this rate of growth does not allow an industry such as ours sufficient elbow room to take care of the very rapidly increasing labor costs over which our control is minimal. Last year the labor cost went up by 10 percent, as an example.

And in addition to that, the airport costs, landing fees, rentals, the cost of construction around airports are increasing at a very rapid rate.

Our economic analysts indicate that the airports or airport costs have gone up about 16 percent in the last year.

So we have very rapidly rising costs and not enough growth to allow you to absorb these types of costs.

In addition, at this particular point in time, we are facing this re-equipage cycle which I spoke of. And at this moment the airlines have firm orders for, oh, almost seven billion dollars worth of these new jets over the next few years.

There are fairly firm commitments of, oh, maybe two billion dollars in airport costs over the next few years. In other words, we can see ten billion dollars [285] in costs facing us over the next few years. And it does not appear that it will generate profits that could even begin to touch this kind of expense.

Also this is a very bad time for raising money. The equities are low. Equity and securities is not a very good way to raise money these days. The interest rates are high when you go into debt financing.

So in all respects it's a very serious time for the airlines. Even though we have every hope that as the economic conditions improve the growth rate will go back to one which will allow us to continue or to resume some degree of profitability.

Q Mr. Von Kann, there has been testimony here of congestion in the national air transportation system. In your position as vice president of operations and engineering do you have any data as to the cost which may have been incurred by the industry as a result of this congestion?

A Yes. We do make estimates. As a matter of fact, I have one or two members of my staff who spend a great deal of time on this sort of thing.

right now it is our estimate that in 1970 our—the industry costs of delay—and this is both air traffic control delay and airport delay—will probably be on the order of one hundred fifty million dollars.

To be more specific, the delay costs of one [286] of our major air carriers a year ago was in excess of thirty million dollars.

Q For a single year?

A For a single year.

THE COURT: Before we get away, gentlemen, from this, your testimony on the less than 1 percent peak, did you say that was 1959 or '69?

THE WITNESS: No; that's '69.

THE COURT: '69?

THE WITNESS: '69.

And I might say, sir, that the first quarter of '70 makes it appear that the whole industry will suffer a net loss in 1970.

THE COURT: All right.

BY MR. CHRISTOPHER:

Q In connection with the testimony regarding congestion, Mr. Von Kann, there are exhibits in evidence here regarding the high density traffic rules. Are you generally familiar with that concept?

A Yes, sir; I am.

[287] Q Do you have any information on the effect on the distribution of hours of flights which, generally speaking, have resulted from the application of these high density rules?

A Yes. I'll try to answer that as well as I can. Of course, the problem here and our larger and more crowded airports is that the development of the air traffic control and airport facilities has lagged behind, in a sense, we are in a phase now where these

facilities just can't meet the demand and as a result the demand has, in effect, had to be metered by the Federal Aviation Administration.

This was done two years ago by putting hourly quotas at the five most seriously burdened airports, Kennedy, Newark, LaGuardia, O'Hare and Washington National.

It appears probable that other airports may have to be treated the same way in the future, until such time as air traffic control and airport capacity catches up with the demand again.

The net result of these quotas is to attempt to spread the traffic over the operating hours of the day so that you push flights away from the peak hours, which are usually the late afternoon or mid-afternoon hours, out into the so-called shoulders of the peak, and this results in a situation at Kennedy, for example, where you [288] have now maybe eight or ten hours of the day where things are going virtually up to the quota level.

Q Is one result of this to push flights into the shoulders, as you say, or the later hours in the evening?

A Yes, this would be the case, that as the traffic increases you will try to utilize the least well utilized times. It also has some tendency to put more emphasis on the use of the satellite or so-called reliever airports.

Q Can you describe generally, Mr. Von Kann, what steps have been taken by the air carrier members of ATA in the noise abatement field?

A Yes. The air carriers became concerned about noise long before we had jets. As a matter of fact, back in—almost 20 years ago, in 1952, as I recall, a committee of the carriers and their pilots came together in the New York area, in order to try to see what

could be done to alleviate noise, and these were propeller planes, of course, at that time.

The carriers did institute operation of procedures, which would abate noise. In other words, by modifying flight paths or the approach in climbout angles, or things like that.

Actions were taken to attempt to minimize the impact of noise on the population surrounding or living [289] around the airports.

When the jets came in the airlines invested roughly fifty million dollars in the development of suppressors to suppress the jet noise, and the installation of these suppressors into the fleet cost the airlines something in the order of one hundred fifty million dollars, in addition to which the operating costs were increased by maybe two hundred fifty thousand a year, or some amount like that, because the operating efficiency of a plane equipped with suppressors is not quite up to standard.

In addition to that, when the so-called fan jets came in, they were quickly brought into the fleet. The fan jets simply have large fans, or they are really a large form of propeller up at the forward part of the engine and they blow a great deal of air past the jet engine itself, and that tends to reduce some of the jet noise.

Q How does that differ from the turbojet?

A Well, in the turbojet all the air comes through the engine and it is quite noisy because there is nothing to insulate or in any way redistribute the blast coming out of the rear.

The fan jet brings air around the engine. That is why they call them bypass engines, and this air that is bypassing the air that is going through the jet [290] tends to quiet it to some degree.

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The new JT-9-D engine on the 747 is called a high bypass ratio engine. The bypass ratio is about 5 to 1, and that is one reason why this aircraft has fairly good properties, qualities.

Q Which aircraft still has turbojets in contrast with turbo fan engines?

A I don't know if I can answer that in any specific terms, but we are down to a rather limited number of turbojet engines. I would say there are probably not more than a hundred or so in the fleet. Most of the four-engine jets are turbo fans.

Q The turbojet then was the original or the pure jet?

A Yes, sir.

Q And the turbo fan is then an improvement or modification of that?

A That might be called the second generation engine.

THE COURT: Does the fan perform any service other than the noise reduction generally?

THE WITNESS: Well, it also helps to increase the amount of air that comes through the engine.

THE COURT: To cool it, in those aspects, or what?

[291] THE WITNESS: There is some cooling property for the air that goes around the engine and for the air that is introduced into the engine that increases the amount that can be heated and therefore you increase the power of the—

THE COURT: Chiefly for the noise properties, the fans?

THE WITNESS: Sir, I don't think I am enough of an engine engineer to answer that question. I don't think I should attempt to.

THE COURT: It probably isn't too important to the question here.

MR. CHRISTOPHER:

Q Mr. Von Kann, will you describe briefly what your concept of the national air transportation system is?

A Yes, sir. To me the national air transportation system has three major elements. First of all, there is the ground or the airport complex. In other words, our system of terminals.

Secondly, there is the airway part of the system, and this involves the FAA air traffic control system which, of course, is operated by the Federal Government, and this includes the towers, the centers, the flight service stations, the people, the communications, all the facilities by which the Federal Aviation Administration [292] regulates traffic in the air and attempts to insure adequate separation, as well as efficient and expeditious flow.

Then finally there is the fleet of aircraft itself and the part I am interested in is in, of course, the scheduled air carrier portion thereof.

I guess we should also point out that there are two other aspects of the system, and that is, a dual form of regulation, technical regulation by one portion of the Federal Government, that is, the Federal Aviation Administration. They regulate for safety, as I have mentioned, for efficient flow of traffic, safe flow of traffic, the noise, for the airworthiness of the aircraft, and then you have economic regulations by the Civil Aeronautics Board, which regulates from the standpoint of routes and fares.

So you have really these five elements in the system.



Q Will you briefly differentiate, Mr. Von Kann, between the air transportation system and the surface modes of transportation? What are the principal differences?

A Well, the biggest difference of all is that aircraft have such a range and such speed and they involve such technical complexity that they have to be managed on a centralized basis.

[293] As the earlier witness pointed out the scheduling complexities, this is quite true. One has to schedule them from the standpoint of the whole system, the maintenance requirements, to be certain that they are at the appointed place at the appointed time, so they can be maintained. They have to be scheduled so they interconnect with each other. And of course they have to be scheduled in order to have the crew cycles mesh. Other forms of transportation, of course, have scheduling problems but much less complex ones.

I think, also, the number of jurisdictions involved is a major difference. For example, a typical airline aircraft will make, in a 24-hour period will make ten stops in eleven different states and overfly maybe another ten or eleven states, and during this whole time they have to be operating under conditions where, if there is no visibility, the plane can be safely moved, safely separated from other aircraft, and brought in to land.

Now, with other forms of transportation, surface forms, you don't have these degrees of complexity. You know where the rails are, you know where the roads are. There is not a matter of—you just don't have this degree of technical difficulty and dependence on your other components of the system.

Q In view of these differences you pointed out, [294] Mr. Von Kann, what nature or kind of control or authority appears to be required for aviation?

A Well, with all types of aviation, and by this I mean transport aviation, both military and civil, it always has to be centrally controlled under a central authority, and in the case of the airlines we not only have to be controlled centrally but regulated, both technically and economically, by the Federal Government.

[295] Q Mr. Von Kann, there is an exhibit in evidence, which is Exhibit 52, which shows that if the Burbank ordinance were in effect at all airports in the country of a comparable character 1,009 flights would be in violation of that ordinance and would have to be canceled out or something done about them.

Your Honor, I might take this moment to supply an answer to a question which was raised yesterday in connection with this exhibit.

The airports listed in this study are all the airports listed in the official airline guide and the number that I didn't have yesterday, to my embarrassment, is 963.

Now, drawing your attention to the fact that 1,009 flights would have to be canceled because they would be in violation, Mr. Von Kann, I'd like to ask you to comment on the effect that this would have upon the air carrier industry and particularly with respect to the movement of passengers.

THE COURT: You mean nationally, now?

MR. CHRISTOPHER: Yes, sir.

THE WITNESS: Well, we don't have detailed information on numbers of passengers, but looking at the night flights, and from the statements of the other witnesses, and from our own experience, we know that many of [296] these night coach flights are

fairly well crowded. They take care of the people who are trying to save money. They take care of the military standbys, the students, people who are having to travel at that hour due to emergencies.

So you have some that have fairly good loads and some, of course, that don't have very great loads.

From this standpoint I guess it is fair to assume that any of these flights must average 10, 20 or 30 people. So that we are talking about ten, twenty or thirty thousand people a day who could not travel at that time and would have to attempt to do their traveling during the more crowded hours, which are the times at which we are trying to unload the heavy traffic.

BY MR. CHRISTOPHER:

Q Could you comment on the effect of the cancellation of as many as 1,009 flights upon the scheduling problems of the airlines?

A Yes. To supplement, again, what was said earlier this morning, this would present a scheduling problem of tremendous complexity. By that I mean that you would have to go through a very complicated scheduling exercise involving all the carriers, because it couldn't be handled by any carriers working alone.

First of all, they have to do their rescheduling in terms of the quotas at the five airports [297] I mentioned. To do this there has to be a very large and cumbersome scheduling committee meeting whenever the schedules are changed, and these go on for days and sometimes weeks. It is a matter of such complexity—

THE COURT: Who is at this meeting? Are all the carriers represented or just a committee?

THE WITNESS: No, all the carriers. First of all, CAB approval has to be obtained to allow them to meet.

THE COURT: This is on schedules and not routes? The routes have already been established.

THE WITNESS: The routes have been established.

THE COURT: And this is scheduling?

THE WITNESS: This is scheduling.

THE COURT: To coordinate the scheduling?

THE WITNESS: Yes, sir. In other words, you have so many slots at these five airports and there has to be some way of determining who gets a slot.

THE COURT: Yes.

THE WITNESS: And it is even now with the night flights as they are a problem of great magnitude. Actually it takes weeks of work, day and night.

THE COURT: That's under CAB authority and not FAA?

[298] THE WITNESS: There has to be CAB authority to meet, because they are dealing with matters which are just on the fringe of competitive items, so CAB has to give them antitrust immunity.

THE COURT: Then after they meet and do coordinate their schedules the CAB has to approve the schedules as set up by the lines, the carriers?

THE WITNESS: Sir, I am not a traffic man, but I am almost certain that they do.

THE COURT: Yes.

THE WITNESS: I am almost certain that they do.

THE COURT: And FAA only comes in in exercising the control to make these schedules work?

THE WITNESS: This is true. FAA has nothing to do with the schedules themselves. Now, the FAA does determine the number of flights that are reasonably safe to—

THE COURT: From the safety standpoint, that's

THE WITNESS: That's correct, sir.

Now, that is, as I say, one part of the problem. The matter of the interconnections between carriers is a matter of great complexity. We did a study with one of our major airlines—American, as a matter of [299] fact—and, if I recall, it was determined that Flight 25 which goes from New York to Dallas and on to Mexico City involves consideration of 100 interconnecting flights at these three cities.

So that when a schedule is changed there is a snowballing effect with all the potential interconnections and new interconnections have to be sought out if they can be.

Secondly, the loss of these flights at night would have a major effect on cargo and mail. Cargo and mail are basically night industries. The mail is collected during the daylight hours, delivered to the airport in the evening, sometimes, oh, from 8:00 o'clock, on.

Out here on the West Coast, for example, the produce is brought in during the day with the idea it can be shipped over to the East Coast and made available on the East Coast markets the next morning.

This just lends itself to night operation. So that the loss of these night hours for both the cargo industry and particularly the mails would have a dramatic effect. It would delay mail delivery, it would increase the expense, it would involve a great deal of additional loss in float as the mail would be in transit longer.

So for cargo and mail there would be a loss of capability which would be very difficult for the industry [300] to cope with and very expensive.

In this same connection, we even have quick-change aircraft like the 727's which can be changed from a

passenger configuration for daytime use to a cargo configuration for night use.

BY MR. CHRISTOPHER:

Q Mr. Von Kann, I would like to go back for a moment to the colloquy between you and Judge Crary regarding the high density rules and what you referred to as the metering of aircraft.

Now, the number of aircraft which are permitted into any of the five airports you mentioned are determined by what agency?

A Well, the numbers, the quotas, are established by the Federal Aviation Administration. They put out a rule establishing these quotas.

Q I would like—

THE COURT: Each airport?

THE WITNESS: At the five airports.

THE COURT: Those five on that regulation that was passed?

THE WITNESS: Yes, sir.

THE COURT: All right.

THE WITNESS: Yes, your Honor.

MR. CHRISTOPHER: Your Honor, I would like [101] to—

THE COURT: It's an exhibit here.

MR. CHRISTOPHER: Yes, your Honor. Exhibit No. 48.

I'd like to bring that to the attention of the witness. I'd like to ask Mr. Von Kann to read the paragraph which is marked here in pencil.

Your Honor, it is the first paragraph to which I called your attention.

THE COURT: Column 3?

MR. CHRISTOPHER: Column 3. It begins, "In regard to . . ."

THE WITNESS: "In regard to some of the comments it appears important to correct any misunderstanding in regard to the purpose of NPRM—that's Notice of Proposed Rule Making—"68-20. The proposals contained in that notice were intended to provide relief from excessive delays at certain major terminals. They were not, as some persons concluded, intended to correct a safety problem.

"In response . . ."

Do you want the next?

BY MR. CHRISTOPHER:

Q No. That's far enough.

[302] So in view of the comment by the FAA in Exhibit No. 48, Mr. Von Kann, is it your understanding that the high density rules were based upon an attempt to avoid delays and improve efficiency?

A I would say that. Although the language I just read is correct, I think it could be said that if this delay and congestion were not taken care of in some way that potential safety problems might have presented themselves.

Q Inefficiency could lead into safety problems?

A Potential safety problems. Not that there were actual ones at that point. So it involves, I would say, both the prevention of a situation of a situation which might be hazardous as well as a more efficient and economical and reliable flow of traffic.

Q Do you have any specific data, Mr. Von Kann, with respect to the effect upon the maintenance schedules of airlines that might be useful in evaluating the effect of a nation-wide curfew?

A Well, yes. Because, again, the maintenance is—it is a nocturnal part of the industry. But the night

are needed for maintenance. As an example, in the case of United Air Lines, roughly 10 to 12 percent of their fleet receives maintenance every night. Now, some of this is routine maintenance and some of it is non- [303] routine. It's about a half-and-half breakdown.

Now, of the more than 100-odd stations that United serves they have some mechanics with a minimal capability at 25. They only have six bases, though, where they can handle major mechanical work and there they have the complete complement of trained people and facilities that are needed for what I call major maintenance.

Now, to get the aircraft at these places at the right time, of course, is another one of the complications of the scheduling problem which the carriers have to deal with.

Sometimes this involves repositioning flights at night and during the curfew hours so that the aircraft can be made available at the next location.

In my opinion, if these hours were no longer available on an overall system basis the carriers would be forced to establish additional maintenance facilities, which would mean, of course, more equipment, more people and at very considerable outlays.

Q Mr. Von Kann, right on that point would you give us an indication of the effect in an overall sense on the economic health of the air carrier industry if there were a nation-wide curfew requiring the cancellation of as many as 1,009 flights a day?

[304] A Yes, sir. I'll attempt to do so.

It is obvious that we haven't made a study in the way that Continental Airlines has done so. But I think it could be said that this would—considering

our financial condition at the present time, I think it could be said that this would border on a catastrophic development.

We have discussed the effect of attempting to accommodate many thousands of passengers during the daylight hours when the system is already tending to be overcrowded.

We talked about the scheduling complexities. It is quite clear again that whereas some schedules might be shifted to the daylight hours, some of them would have to be abandoned entirely. So that there would be some deterioration in the public service.

The maintenance problems have been discussed. This would undoubtedly result in considerably added maintenance costs.

The cargo and mail missions of the carriers would be affected in a way that is almost incalculable. If cargo could not be handled the way it is at night and has to be handled during daylight hours when, again, it would cause conflict with the passenger business or facilities, this would undoubtedly delay the cargo service and mean a loss of business to the air carriers, because some customers would go to other modes of transportation.

[305] The mail would be delayed. Half of the mail, I think it has been established, is handled at night. So there would be delay in extra expense to the public.

All these complexities and additional expenses coming at a time right now when the airlines are actually losing money—and it appears quite clear that they will in 1970—almost has to be looked at in terms of a disaster of some magnitude.

THE COURT: I think maybe this would be a good time to take the noon recess, Mr. Christopher.

MR. CHRISTOPHER: Your Honor, I have no further questions of Mr. Von Kann.

THE COURT: Very well.

MR. CHRISTOPHER: May I inquire if Mr. Sieg intends to cross-examine?

MR. SIEG: Yes, I do.

THE COURT: Very well. Then we will recess until 1:30.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 1:30 o'clock p.m. of the same day.)

[309] LOS ANGELES, CALIFORNIA, WEDNESDAY, SEPTEMBER 16, 1970, 1:30 P.M.

THE COURT: Very well, Mr. Sieg, I believe you were about to cross-examine.

CLIFTON F. VON KANN,
the witness on the stand at the time of the noon adjournment, resumed the stand and testified as follows:

CROSS EXAMINATION

BY MR. SIEG:

Q General, I notice your title, at least as listed in the list of witnesses, Vice President, Operations-Engineering.

May I inquire, what significance the word "engineering" has in terms of your duties as a vice president.

A Yes, sir. The engineering portion of my department deals largely with the FAA on behalf of the air carriers on matters pertaining to airworthiness directives, engineering programs and maintenance programs.

Is this responsive to your question?

Q Yes. In terms of engineering, may I inquire as to your education in that area, as it pertains to aircraft.

A I do not have an engineering degree or an aeronautical engineering degree. My two subordinates, assistant vice president-engineering and a director of [310] engineering, are both aeronautical engineers and I depend on them for this type of technical knowledge.

Q I see. You did mention in your direct examination, or you made a reference to the fact that suppressors had been installed or had—the idea at least had been initiated by the airlines which formed your association or which form your association.

You mentioned suppressors on jet aircraft, did you not?

A Yes, sir.

Q Now, may I inquire exactly—would you enlarge on that statement as to what the companies involved in your particular association have done in that area to abate the sound or noise from jet engines?

A You mean since that time or to specify further on that point?

Q Maybe we had better start with what period of time you were referring to in your direct examination.

A I mentioned the early jets which, of course, means the early '60s.

Q Yes.

A And the suppressors I referred to is a type of hardware, nozzles and other devices which you can mount at the exhaust portion of the engine, which tends to reduce what is called the jet roar.

[311] THE COURT: Just on the early jets or is that also on the fan jets?

THE WITNESS: It is not necessary on the fan jets because it is a different technical problem, sir.

THE COURT: That million dollars that was spent to install these suppressors, that was on the original jets, is that right?

THE WITNESS: Yes, sir.

THE COURT: The turbojets.

THE WITNESS: The turbojets, yes, sir.

THE COURT: All right.

BY MR. SIEG: Now, back in 1960?

Q That was back in 1960?

A Early '60s would be the correct time range.

Q Now, had anything occurred between '60 and the present time, insofar as attempts or engineering by the airlines involved in your Association, in the way of further suppression by engineering techniques of noise, with respect to pure jet aircraft?

A I am afraid I am going to have to ask you to clarify that, if you will, sir, because I am not sure what you mean by pure jet aircraft.

Q Let's take a 727 as a pure jet.

A Well, the 727s are of the turbo fan type, I believe, and with the types of aircraft one has to depend — [312] well, let me answer this another way.

There are two types of noise that emanates from jet aircraft, so-called jet noise or the jet roar, which is largely the flow of air coming out of the tailpipe, and then there is the internal noise or what they call engine noise or fan noise, which is associated with the high frequency whistles and that sort of thing.

Now, the airlines have initially emphasized the suppressors, which had to do with the jet roar. As the second generation jets came in a great deal of acoustic material was inserted, which tends to change the frequency of the engine noise and tends to minimize the disturbing qualities of what I call the whistle or the engine noise.

During the latter of part of the '60s the main efforts to reduce jet noise further or the jet roar further

have centered on the so-called high bypass ratio engines which we described earlier.

There is still additional research now underway to determine what further can be done to suppress the so-called jet roar, and we are doing all we can to encourage this sort of research.

I might say that in a regulated industry, such as ours, it does not have a great deal of money to invest in R and D, but we tend to do all we can to encourage [313] this by the manufacturers or government programs that will result in this type of R and D.

THE COURT: Where does your money come from, from dues or contributions from your member carriers?

THE WITNESS: I am sorry, sir. When I say "we," I meant the industry as a whole. So far as the Association, yes, our members pay dues according to a so-called ton mile formula.

BY MR. SIEG:

Q If I have been correctly reading certain articles in the newspapers, is it true that at the present time there is technology available to retrofit the pure jet or jets to substantially reduce the noise that they emit?

A I would say that is not really true. We have gone into that in great depth and I have personally. What has been done is that two engine aircraft configurations, one for DC-8 and one for 707 have been tested with prototype nacelles, largely involving additional noise suppression material, and which, as I have indicated, is aimed namely at the engine noise, rather than the jet roar.

With these two prototypes there was some progress in reducing that type of noise. Call it approach noise, if you will.

There was very little effect on the jet roar. [314] There are probably something like maybe, oh, fifteen or so different engine airframe configurations with the four-engine jets we have, in effect, only done a very small part of the R and D that would be necessary to retrofit the entire four-engine fleet.

Now, the studies that have been made by the manufacturers, as well as the airlines and in some cases independent studies, indicate that there would actually be very little perceptible improvement if a program of this magnitude and expense were undertaken. And furthermore, the cost would run somewhere in the vicinity of a million dollars per aircraft, so it has been our conclusion that the benefits which would accrue to the public, the perceptible benefits be very—would be minimal. The program would be tremendously expensive. We are talking about a program which altogether would run the industry over a billion dollars, which is just completely beyond our financial capabilities at this time. And that rather than do this we should continue the R and D to try and get suppression equipment that is more effective and with better economy.

[315] Q Again, referring to general information—maybe you are likewise aware of this—I recall at the time the Los Angeles—LAX put into operation the new runways that there was a demand, if you can call it that, or at least a request that LAX restrict the use of those particular runways to 747's.

Now, I would assume from that and also from what you have indicated that the 747 is substantially quieter than, say, a 707 or DC-8. Is that true?

A I have heard the tapes on all those aircraft and I would say that the noise of the 747, although somewhat of the same order from the standpoint of decibels,

seems to be a less objectionable type of noise than that of the 707 and DC-8. I think this would also be true of the new wide-body jets coming into the fleet.

Q This is like the Lockheed Tristar?

A Yes, sir. And the Douglas DC-10.

Again, this is hearsay, but I am told that everybody who saw the initial flight through the DC-10 seemed to be very quiet.

Q Are you able to elaborate on your previous testimony as to how or why the 747 achieves a more desirable sound level, for example, or a more acceptable sound?

A Not entirely. I am aware of the fact that there is a very considerable amount of acoustical [316] material in the nacelle of that engine. But beyond that I would not want to qualify myself as an expert or attempt to.

Q Now, I think you indicated that the airlines forming or making up your association have presently in operation around 60 to 70 747's. Was that correct?

A Sir, that is a rough figure. It undoubtedly includes some foreign carriers not in the association. When you have a new plane coming into the system it is changing so rapidly that one is never quite up-to-date. I'd have to put that in as an estimate, but I think it is probably within a reasonable figure.

Q Well, I wasn't trying to hold you down to any specific figure. But this is an approximation?

A Yes, that's an approximation.

Q Then this number is going to increase substantially with additions of 747's and the other wide-body jets?

A Wide-body jets, yes, sir.

Q Now, how many passengers does, for example, a 707 normally carry, or is it able to carry?

Well, in some of the denser configurations the 747, I guess, can go as high as 160 people in an all-coach seating, or something of that order of magnitude.

Q Yes. And the 747 or other wide-body jets?

[317] A Well, they will be up in the 250 to 350-passenger category, again depending on the configuration. I guess with some versions of the 747 you could get in over 400. But it is in those orders of magnitude.

Q Now, prior to the introduction of the 747 did your members have adequate jet aircraft, a sufficient number of jet aircraft to handle the passenger load?

A I don't know if I can properly answer that question. You see, this really gets into a matter of decisions of individual companies. The matter of how many planes to buy and what routes to apply them on is done individually. This is not a matter on which the trade association is consulted. I would say that probably the airlines at that time, three or four years ago, with business growing as it was, they were purchasing rather actively. But whether or not they considered this adequate or what they considered as adequate it would be hard for us to say.

Q May I inquire, then—maybe you can answer the question—with the introduction of the wide-body jets, as it continues I would assume that these jets will replace the other jets in your various passenger routes throughout the country and into foreign countries.

A Again, I would say that this could only be true to a certain extent. Throughout the system you have routes that have different passenger densities, where [318] you can only generate so many passengers a day. For some of the lighter routes undoubtedly the airlines will continue to operate the small jets. The 727 stretch 727 in an all-coach configuration can

handle better than 150 passengers. So I think that no matter how far into the future you look you will find a mix of different types of aircraft throughout the fleet, depending on the routes, the densities, the traffic load that that route can be expected to yield, for some of the larger jets would just be too large.

THE COURT: Will the 747—is it contemplated that it would replace the 727 traffic or the 707 traffic?

THE WITNESS: More of that, your Honor. More of the 707 type of traffic.

THE COURT: Well, what about the runway facilities that are required for the larger jets, the 747, can they use the runways of the 707?

THE WITNESS: Yes, they can.

THE COURT: Can they use the runways of the 727?

THE WITNESS: Well, I am not quite sure of that one. I don't have that information available.

THE COURT: Or the DC-9?

THE WITNESS: Well, I have some doubt about [319] that. I'd have some doubt about that. I think the overlap would probably be with the current four-engine type of jet or the two- and three-engine type of jet. I think their load would be larger than that for most runways on which those jets are used.

BY MR. SIEG:

Q How long do you believe, General, that we will have to in some form face up to the noise created by the 707's and the 727's? How soon will they be phased out of operation either by your companies or by virtue of just falling apart or general obsolescence?

A I would say, sir, that assuming a 12-year life on these machines, which is a reasonably—that's a fair figure for their use by the airlines, because after

they have been operating a certain number of years they become more expensive to operate. Then there is a tendency to bring more productive and newer equipment into the system.

Assuming that, you would probably have a phase-out of the four-engine fleet somewhere in the early '80s. This again is an approximation, but I don't think it is too bad a one.

Now, I'm only speaking of scheduled airlines. I can't say that those planes are going to go into the salvage yards. Somebody else will buy them for their—foreign carriers or other operators. So that they may still [320] be around.

But I think as far as the scheduled airline industry is concerned that's a reasonable expectation.

Q Does your association have any policies regarding the use by its members of airports which by virtue of their location create a serious problem to persons residing in the vicinity?

A You mean from a noise standpoint?

Q From a noise standpoint.

A I think all one could say on that is that we in the association are keenly aware of the problems which noise creates. We have attempted to undertake any programs or any effort which we feel will produce relief. As far as where the various carriers that form the association operate, these are things which they have to work out.

In other words, we process the various requests that they put in for airport facilities and in turn submit them to FAA, which is responsible for the national airport plan. But as far as the airports used by the airlines, I think the trade association would have to be called a channel rather than a policy-making or decision-making group.

Q Well, specifically are you familiar with the Hollywood-Burbank Airport?

A In general terms, yes. I have flown in it [321] out of it once or twice. I don't have great familiarity because our regional offices deal with local problems.

Q I assume from that you are not aware of the problems which it has created in this City of Burbank.

A Not in specific terms, sir.

[322] Q Well, if your policy is a hands off policy, let's say, generally in terms of where your members operate, may I inquire why your Association is intervening in this case?

MR. PACKARD: I object. This is irrelevant.

THE COURT: No, objection overruled.

THE WITNESS: Yes, sir, we are intervening because we feel that an action such as is contemplated here, if carried out on a widespread basis, which it indeed would be, would create an intolerable burden on the air transport system and on interstate commerce.

BY MR. SIEG:

Q Why do you feel this is going to be carried out on a national basis?

A Sir, I can only answer that in the light of the experience that I have had and other people have had dealing with the local authorities, and my answer is it is inevitable.

Q What is inevitable?

A That the institution of a law or a rule or curfew such as this would be followed by virtually all comparable types of local airport authorities.

THE COURT: What you say is generally the noise is so bad that if this ordinance is valid, why, everybody in a like situation would pass a similar ordinance?

[323] THE WITNESS: I think that is a fair statement, your Honor.

THE COURT: I think Mr. Sieg will almost go along with that. Maybe not.

MR. SIEG: No, I wouldn't. I would go along on the basis that the particular and peculiar location and situation of an airport in relation to its surroundings and inadequacy in terms of land should be a proper criteria for local action.

I do not suggest, and I am certain the General would not suggest, that if this court should determine that this ordinance is valid and it is not in conflict with any federal statute or regulation, that Los Angeles International Airport would then be restricted to the same extent.

THE COURT: Not automatically certainly. The satellite communities might well pass a similar ordinance. It may have something to do, before we get through, with commerce, and so forth, I don't know.

We are getting evidence in now and we will argue it later.

MR. SIEG: Yes.

THE COURT: We all know human reactions to noise and the efforts to abate it, legal efforts.

MR. SIEG: Right. One of the—I won't [324] argue the case at this point.

Q The figure was thrown out that there were 963 airports listed in a certain guide of some kind and utilized, I think, in some of the compilations that have been introduced in evidence.

Have you any estimate or approximation as to how many, if that is an accurate figure,—or a thousand, say, as a general figure—how many of those are privately owned as opposed to those that are publicly owned?

A I do not have that information, sir. It is possible counsel has.

Q Would you have any estimate?

A No, I would not.

Q It has been indicated in the pleadings that Lockheed or Hollywood-Burbank is one of the largest or the largest private airports in the country.

Are you familiar with any other large private airport, not operated or controlled by a public agency?

A No, I really am not, sir. You see, we have—the way we are organized at this time there is another department more or less on the same level as mine that deals with airport facilities and airport programming, and I just don't have a great deal of familiarity with this aspect of the problem.

[325] MR. SIEG: That is all I have at this time, your Honor.

THE COURT: Very well. Any redirect?

MR. CHRISTOPHER: One or two questions in clarification, your Honor.

REDIRECT EXAMINATION

BY MR. CHRISTOPHER:

Q Mr. Von Kann, do you know whether the runway criteria are different for the 747 on the one hand from those which would be applicable, on the other hand, to the two other new wide body jets, the DC-10 and 1011?

A No, I don't have that information. The 747 is a heavier aircraft, so I presume it might be rated or require a slightly heavier runway. But this depends on other factors, such as the landing gear construction.

Q So when you answered the question that the new wide body generation would generally be using the same kind of airports or have the same runway criteria

the 707, your answer was largely in terms of the 747, rather than in terms of the other two wide-body jets?

A Yes, I have more information on the 747. That was one of the original criteria.

I would expect, however, that the others would have similar—would be in the same general ballpark.

MR. CHRISTOPHER: I have no further questions, [326] your Honor.

THE COURT: Mr. Sieg, do you have anything further?

MR. SIEG: Nothing further.

MR. CHRISTOPHER: May Mr. Von Kann be excused, your Honor?

THE COURT: Yes. You may be excused.

THE WITNESS: Thank you, your Honor.

(Witness excused.)

THE COURT: Your next witness.

MR. CHRISTOPHER: Mr. James T. Pyle.

JAMES T. PYLE,

called as a witness by the intervening plaintiff, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated.

Will you state your name, please?

THE WITNESS: James T. Pyle; P-y-l-e.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. CHRISTOPHER:

Q Tell us what your residence address is, Mr. Pyle.

A Sandy Hill Road, Oyster Bay, Long Island, 11771.

Q Tell us what your educational background and [327] occupation and present position is.

A Yes. I was a student at Princeton University with a liberal arts degree, and then I went to work for Pan American Airways in 1935, and was with them for about eleven years.

Q In what capacity?

A As an airline inspector, did some instruction, then a junior executive in Latin American operations.

Q What is your present position?

A My present position is director of the Aviation Development Council at La Guardia Airport, New York City.

Q Will you tell us what the Aviation Development Council is, what its purposes are and what the membership is made up of?

A The Aviation Development Council goes back to the organization that was formed, to which Mr. Von Kann referred this morning, in 1952, and it is kind of a new derivative of that effort.

It is formed by the airlines serving New York City and Port of New York Authority, which is the airport operator. They support the program and its intent is to, I would say, plan programs that will, as their basic objective, stimulate and promote the growth of air commerce in every respect. Not only to provide the necessary facilities, but to insure that in doing so [328] we have due regard for some of the problems it creates for the communities.

Q What airports are involved in Aviation Development Council, which is known as ADC?

A John F. Kennedy International Airport, La Guardia Airport, Newark Airport, which is one of the three airports serving New York City, Newark, New Jersey.

Q When did you take over as director of ADC?

A On 15 August 1964. I have been there about six years.

Q Prior to that time you had held high government positions in the field of aviation.

Would you trace briefly your career in governmental aviation circles?

A Yes. In 1953 I left Denver, Colorado, and went to Washington as a special assistant to the Assistant Secretary of Navy for Air in the Navy Department as an airspace specialist and adviser, and I worked there for about three years and then left, at President Eisenhower's request, to become Deputy Administrator of the Civil Aeronautics Administration.

Unfortunately, shortly thereafter the Administrator died. I then became the Administrator in 1956.

Q Of the Civil Aeronautics Administration?

[329] A Of the Civil Aeronautics Administration, CAA. In 1958—

THE COURT: How does that fit in with the Civil Aeronautics Board?

THE WITNESS: The Civil Aeronautics Administration, sir, is the operating arm—

THE COURT: Of the Board?

THE WITNESS: No, of the Government.

THE COURT: I see.

THE WITNESS: In terms of its responsibility with respect to air traffic controls, certification of aircraft and so forth. It does, or, did what the present FAA does now. And I was going to explain that relationship.

THE COURT: All right.

THE WITNESS: The Civil Aeronautics Board, of course, is the economic arm of the aviation section of the Government, and certificates of convenience and necessity, service patterns and fares, and so forth.

In 1958 it became painfully obvious, unfortunately, as a result of several accidents, we needed to have a far stronger arm of the operating side of the Government, and a few of us got together and basically set the stage for the Federal Aviation Administration or Agency in the early days, which became the Act of 1958, and [330] created the FAA or Federal Aviation Agency at that time, into which we folded the CAA, and we were the major component of the CAA—of the FAA.

BY MR. CHRISTOPHER:

Q So having been administrator of the CAA your next post was as deputy administrator of the new FAA?

A That is correct.

Q And the CAA having been folded into the FAA.

A That is correct.

Q By the legislation.

A And the FAA assumed all the responsibilities of the CAA, plus several additional ones, the most important of which was the rule making authority which previously had been vested in the Civil Aeronautics Board.

Q Mr. Pyle, you indicated you had some involvement in connection with the 1958 Federal Aviation Act.

Will you tell us what that involvement was, what role you played?

A Well, it is a little difficult to explain exactly the role, except what we were after, frankly,—and I would hope this would be responsive—we were after a better—or a better structure in order to handle the complexities of the management of the airspace and

insure safety of operations across the board. This involved, of course, when you speak of the management of the airspace, [331] the relationship with the military services, which had been far less satisfactory, and, in fact, probably the two military accidents were the problem that precipitated the creation of the FAA.

(332) One of our prime objectives was better use of the airspace, more efficient use of the airspace, or, in the traffic controller would say, the expeditious movement of air traffic.

Q What particular problems of efficiency were you trying to correct in the development of this new Act?

A We were trying to correct the inadequacy of the present—the management of the airspace at that time in terms of facilities that were not adequate to handle the job; in terms of some of the procedures that were being used; in terms of the responsibilities with respect to the users of the airspace, particularly the military services.

Q What was the nature of the safety problems that you were seeking to correct, if you can differentiate them from the problems of efficiency which you have just described?

A In a very capsulated form I would say that the most serious problem that we were faced with was perhaps the disciplinary operations, the discipline that was involved both within the airspace and within the individual operations of the air carriers and general aviation. Using a Navy expression, we felt a tighter ship was needed.

Q Now, Mr. Pyle, in your duties as Director of the Aviation Development Council, have you ever made a study of the effect of a night curfew or a curfew on night [333] operations?

A Yes, we did. We were faced with this as a threat on many sides, with particular respect to the three airports for which I am responsible in part.

Q What year was that?

A This was in 1966. We made a fairly elaborate analysis of the whole problem and we came to the inevitable conclusion that it would be an untenable burden on air commerce, that very serious economic penalties would be created and that it would reduce the service which, after all, the air transport industry is but a service industry to a vast segment of the American population and the financial world, air commerce in a broader sense. As a result we took whatever means we could to insure that this would not become a reality. In essence, we could not live with it.

Q Mr. Pyle, I would like to have you tell us more about the nature of the study you conducted. What was the basis of the study? Or what assumptions were used in making your study?

A Well, we assumed, for one thing, that if a curfew of any kind were imposed because of the problems—and we, as General Von Kann also pointed out, are perfectly well aware of some of these problems—one of the principal responsibilities I have is to keep closely tuned in with all [334] that's going on and towards the relief of these problems—we assumed that a curfew once imposed and once it became a fact of life would proliferate across the country.

Q Why is that? Why did you assume that?

A Because of the problems that are created, without any question, due to aircraft operations. Those who are close to airports find problems with aircraft operations. We are well aware of this. As a result we try to do what we can to attenuate them. But the

fact remains that if a curfew is imposed that it becomes quite evident that it will be picked up across the country and become a nation-wide thing and be implemented on a nation-wide basis.

Q What airports were directly involved in your study?

A We studied, as I recall, 25 city pairs. By this I mean 25 cities that had service to and from the New York Airport. These were cities which ranged in terms of traffic the first 25 cities in terms of traffic served by New York.

Q Now, what kind of a curfew did you assume for purposes of your study?

A We assumed a curfew on operations from midnight to 7:00 in the morning.

Q When you say it was curfew on operations, I [335] assume you mean both landings and takeoffs.

A That is correct. An operation technically would be a landing or takeoff. We assumed that if a curfew was imposed as threatened in New York at that time it would be on all operations at an airport.

Q Now, Mr. Pyle, you have given us what I might call the bottom line of your study, that you couldn't live with it, as you said. But I would like to talk to you in more specifics about the results of your study.

Did you study the effect that such a curfew might have on the very problem that caused this, the noise abatement problem?

A Yes, we did. Our conclusion was that it really would not help.

Q Why was that?

A For the simple reason that if you impose a curfew and you try and maintain a modicum of service to the traveling public you have to bunch the flights

in hours preceding or following the curfew. In those hours preceding the curfew these flights would be bunched at hours which are relatively less used than the peak hours. I am speaking, say, from 9:00 to midnight, in our case, in our study.

We found, however, and not surprisingly, that the complaints that originated as a result of aircraft [336] operation in the hours of 9:00 to midnight were far more—there were a greater number of complaints per number of operations than the hours of, let's say, from 6:00 to 9:00. In other words, the late evening hours operation generated complaints.

So this was one point we felt we were not really helping the situation were we to impose the curfew provided we could have lived with it.

Q Did you make any analysis in connection with your study of the effect of a nation-wide curfew on postal carriage, postal service?

A Well, there were several conclusions with respect to that. With respect to the postal service it is estimated that one billion letters annually in and out of New York would be delayed 24 hours.

Now, there were, of course, other aspects to it in terms of service. Shall I deal with those?

Q Yes, go ahead.

A We estimated that approximately 1,107, I believe the figure is, weekly services would be eliminated by the curfew. Those are direct operations, either landings or takeoffs. But that another 1,370-odd operations would be eliminated because of the positioning problem, which I think Mr. Mitchell described this morning. In other words, a total of 2,474 operations would be eliminated. Of these, [337] 607 were all cargo and that represented 42 percent of the all-cargo operations.

So it was a dramatic reduction in service to the New York community.

Q Did you make any analysis in that connection of the effect of a nation-wide curfew on passenger service?

A Yes. But I would have to point out that these figures are extrapolations and estimates in this respect. We ascertained that approximately a million passengers a year would use services during the night to leave New York.

Now, if you add to that—now, this, I might point out, is based on 1965 schedules. This was the year 1966. If you add to that the people who are incoming, I suppose you could estimate a figure of approximately two million passengers a year that would be affected. One passenger in four originates or is destined to New York nationally.

So, using that figure you come up with a figure of approximately eight to nine million people who would be affected nationally in 1965.

Operations since 1965 have—or passengers carried have increased approximately 70 percent. So that you would apply the 70 percent factor to, say, eight million and you end up with around thirteen to fifteen million [338] people affected.

Q Have you given us the principal results of the study as you now recall them?

A Well, I think I would like to just mention one other aspect and that is the air cargo business. Air cargo literally exists on its ability to operate at off-peak hours. This, of course, is a very great convenience from the standpoint of congestion in the airspace. But, more importantly, it is a service to the customer who is either the shipper or the consignee. In large measure

the freight is assembled and loaded somewhere between 12:00 and 2:00 o'clock in the morning. I am speaking specifically, now, of New York. It then leaves and is on the Coast about 5:00 o'clock in the morning. It is at the consignee's dock on the order of 8:00 o'clock, depending on the distribution at this end.

Now, all of this business has been built up by companies such as, for instance, Raytheon, who no longer have large warehouses of parts, they ship it out to serve their customers using airfreight. They can eliminate all their warehousing.

If you have a curfew and if it is nation-wide that kind of service just becomes practically nonexistent or no longer meets the requirements of the public.

Q Mr. Pyle, I think you told us, if I recall [339] your testimony correctly, that your study showed that there would be a one-day delay for approximately one billion letters.

A Yes.

Q Did you make any estimate or analysis of the effect of this delay on our economy as a whole, our national economy?

A Not quite in that respect. In other words, in respect to the airmail service. But we did find, for instance, that most of the canceled checks that move throughout the country usually go through the New York Clearing House in one way or another. These are brought in by airfreight. Because of airfreight and because of its ability to move at night those checks go through the clearing house the following morning. This in the economy of 1965 meant a saving in bank interest of \$34,000,000.

Now, I suppose if one were to extrapolate that into terms of money moving around now it would be far more, perhaps close to \$100,000,000.

I can only cite that in 1967 there were 1.3 trillion dollars worth of checks that went through the New York Clearing House, most of them coming in by air-freight.

Last year, 1969, 3.3 trillion dollars.

So there is an order of magnitude that has [340] to be applied to the figure I gave you. \$34,000,000.

Q Mr. Pyle, the study you made was based upon the assumption of a nation-wide curfew on both landings and takeoffs.

A Yes.

Q And no doubt the figures you have given us were made on the basis of such an assumption.

How would you think that would be diminished if the curfew were solely a curfew on takeoffs, as it is in the case now before the court?

A We have not ever looked at it in this form, but I would say conservatively it would be 50 percent, but my intuition, and this perhaps is dangerous, would say it would be somewhat more.

The whole problem of positioning aircraft, which I think Mr. Mitchell explained fairly adequately this morning, gets involved in this. Unless you have aircraft to originate schedules the following morning and can get your aircraft through the maintenance procedures to their proper maintenance bases, your system falls apart very quickly.

Q And so you are saying that rather than cutting your estimates or your figures in half, you think they would be cut somewhat less than half if the assumption were again a curfew only on takeoff?

[341] A Yes.

Q To whom was your study or the results of your study reported in 1966?

A Well, we after study and being sure that this was approved by all concerned, that it was in fact a valid study, we presented it in a letter to the Borough President of Queens, The Honorable Mario Cariello, in a letter because it was in his borough, which is a part of the City of New York, in which the two airports lie, that this threat of the night curfew was probably the most important.

MR. CHRISTOPHER: I would like to hand to the clerk and ask him to mark as our exhibit for identification next in order—

THE CLERK: Plaintiffs' 55 for identification.

MR. CHRISTOPHER: —55 for identification a copy of a letter to The Honorable Mario J. Cariello, dated May 10, 1966, signed by James T. Powell.

(Plaintiffs' Exhibit 55 was marked for identification.)

BY MR. CHRISTOPHER:

Q And I will ask you if that is the letter to which you have just referred.

A Yes, it is.

[342] MR. PYLE: Your Honor, I would apologize for the terrible copying job.

THE COURT: It is legible.

BY MR. CHRISTOPHER:

Q Does this letter basically summarize the information which you have given the court in the course of your testimony today, Mr. Pyle?

A Yes, it does.

MR. CHRISTOPHER: I offer the letter in evidence, your Honor.

THE COURT: This was submitted as being a report, the reports made by the Aviation Development Council of New York.

THE WITNESS: Yes, it was.

THE COURT: Was that under your supervision?

THE WITNESS: Under my supervision and we did employ consultants to insure we got accurate figures.

THE COURT: Exhibit 55 is ordered in evidence.

(Plaintiffs' Exhibit 55 for identification was received in evidence.)

THE COURT: What are the chief complaints? Noise is a chief complaint, would you say?

THE WITNESS: Yes, your Honor, noise, I [343] think, has been the factor which triggered this approach on the part of some of the communities around the airport.

THE COURT: They complained of articles of soot and things like that.

THE WITNESS: To a lesser degree. However, we have been able to explain to them the physical problems, if you will, that are involved, the engineering problems, the operational problems, that causes this problem.

THE COURT: Very well.

BY MR. CHRISTOPHER:

Q Since 1966, Mr. Pyle, have you given further consideration to the question of a night curfew or a curfew on night operations?

A Well, only to this extent: That we are always concerned that someone will come up with this idea, because our studies, which convinced us this is not a practical problem or not a practical solution, and we are always keen to anticipate whenever or wherever it crops up and to then work with the communities and explain to them why you don't get there from here with this kind of a solution.

Q Have you changed your mind about the feasibility of a night curfew between 1966 and now?

A Not one iota.

Q While the reported cases in this field from [344] your area, such as the Hempstead and Cedarhurst case, indicate that airports are often surrounded by towns or municipalities. From your long experience in aviation, can you give us some other examples of airports that are surrounded or underlaid by conflicting political jurisdictions?

A Yes. Of course, the three that are under my jurisdiction are prime examples of this factor.

Q Why don't you tell us about those first.

A Well, the worst problem we have, I'm afraid, is with Kennedy International, which is surrounded on two sides, or really two-thirds of the perimeter lies within New York City, The Borough of Queens, and one-third within Nassau County. Politically they are pretty far apart, in fact, they rarely talk to each other.

La Guardia affects two boroughs, Queens and the Bronx.

Q They both have law-making power with respect to some aspects of the airport?

A Yes. I am not a political scientist, but I think the answer would be yes, in part, to the extent that there is considerable squabbles at certain levels in the New York City Government with respect to operations. It is always human nature when one political jurisdiction has operations over flight or their area, they come to us and [345] say, "We'll just move it somewhere else. We don't care what happens, but let's get it from off the top of our heads." And we are, of course, always caught in the middle. This happens between the Bronx and Queens and Manhattan to a lesser degree with respect to La Guardia.

between Elizabeth and Newark, New Jersey, with respect to Newark operations, and, of course, I have mentioned the Nassau one.

I think the same thing applies in, for example, Chicago.

Q What is the problem there?

THE COURT: O'Hare, are you talking about?

THE WITNESS: Yes, sir, O'Hare Airport in Chicago. Well, there is the city, municipality, I guess it would be called properly, and the only thing they ask of us is, "Keep the airplanes away from us. Just put them somewhere else."

I will say in the case of Chicago there has been very intelligent land planning. To the extent Cook County could it has been able to eliminate residential areas, or prevent the encroachment of residential areas upon the airport.

This is one of our problems. Airports are magnets and people come close to airports to live and then, of course, immediately start complaining, and this is [146] understandable.

Other cities, for instance, Atlanta has two political jurisdictions. The county line runs right through the middle of the Atlanta Airport.

We had trouble at Dulles, Loudoin and Fairfax Counties. The line goes right through the middle of that—

BY MR. CHRISTOPHER:

Q I am sorry. I didn't hear you. Did you say Loudoin?

A Loudoin and Fairfax Counties.

Q Thank you.

A So there are many examples. I can't think of any more at the moment.

Q Mr. Pyle, we have here in evidence, and perhaps you heard it referred to this morning, a study based upon the airlines guide, which shows that more than a thousand night flights would have to be canceled or at least they would be in violation if the Burbank ordinance were enacted at all comparable airports having scheduled operations.

Based upon your experience with your earlier study and your experience in aviation, will you comment on the effect of such an ordinance on a nation-wide basis?

A I think it would in general have the same effect that we found in our study. As to the qualification [347] of those effects I would be, I think, ill prepared and I would not be able to comment without a detailed study as to those various airports that would be affected. But it is in the same ball park as the results we found, namely, that it would be an untenable burden on the mail service, on air cargo, on passenger service for those who want late night service.

THE COURT: Did your study include—I haven't read it. Did your study include the three airports, Newark, Kennedy, and La Guardia, or just La Guardia?

THE WITNESS: All three, your Honor, the New York service provided by those three airports.

THE COURT: That is what I thought you said.
BY MR. CHRISTOPHER:

Q You said earlier in your testimony, Mr. Pyle, that efficiency was one of the main goals you were trying to achieve when you and others worked on the 1958 Act.

Will you tell us whether or not you would regard the curfew on light operations of the Burbank character extended on a nation-wide basis as being compatible with that goal?

A Not at all. I think it is directly—it would be—I can't think of the right way to express it, but I think it would be just the opposite. It would [348] create maximum inefficiency. You have the problem of bunching the flights and I think we must think in these days, with the congested airspace that we have, that this is one thing we can ill afford, if we are going to properly serve the traveling public.

The delays at some major airports are getting pretty extensive. Two years ago, for instance, in New York we had delays, average delays of two hours. There were certain factors that were responsible, over and above the lack of airport facilities. But we do not have enough concrete on which to operate the services required by the American traveling public.

As a result, if you eliminated some of this concrete for periods—I am speaking of the runways, of course—for periods during the day or using it mathematically one-third of the day, obviously you do not have an efficient environment in which to serve the traveling public or meet the shippers' requirements or the mail requirements.

[349] Q You have been in the air business all your life, Mr. Pyle. Could you differentiate for us between air transportation and the surface modes of transportation? What strikes you as being the principal differentiation?

A Well, I think in a few simple words I would say flexibility and the fact that the airplane does not recognize boundaries to the same extent that the surface modes do.

The approach to the solution of problems in air transportation at the local level just does not work. It has to be done on a national basis because it is a national operation.

Just one example of this—I don't know whether it is pertinent or not—but, for example—I think the State Department gets a little unhappy about this—we handle air traffic over Canada and Canada handles air traffic over us in certain parts of the North American continent because it is far more efficient for the system to operate in this way.

This is the nature of air transportation. Now in surface modes—and I am not too familiar with some of their problems—they can operate without the requirements of the same degree of flexibility.

Q From the standpoint of regulation or control, what kind of requirements are imposed by the character of [350] air transportation?

A Well, I think General Von Kann made a very good statement when he said it had to be at the national level and it required a uniformity.

For example, if we were faced with a situation whereby an ordinance were imposed at Kennedy such as the Hempstead case, if you had a proliferation of different ordinances all addressing themselves to the same basic problem, noise abatement of different character, of different decibel readings and it would be permitted, there would be utter chaos.

And you have to have one authority that is responsible for the over-all picture in terms of regulations, air traffic management, certification of aircraft and airmen, engines. It is all part of an over-all picture.

Q You refer to air traffic management. What do you include within that concept?

A Air traffic management to me means not only the actual control of the traffic by the controller but it is all of the mechanisms that makes it possible; the facilities, the center facilities, the navigation aids which are

the radio aids, the instrument landing systems, the marker beacons, compass locaters, and so forth. It's the actual communications facilities through which the pilot and the controllers speak to each other.

[351] It's a massive complex, all of which is directed to the movement of air traffic in an efficient way.

Q And permissible hours of flight, is that included within the concept of airspace management?

A No, sir—well, with one exception. Under certain conditions there have been restrictions imposed by the Federal Government for a military exercise, and that's about the only instance I have known where hours of flight were specified in air traffic.

Q Do you think the imposition of a night curfew has a bearing on the concept of airspace management?

A Very definitely.

Q In what respect?

A It's a deterrent to the efficient use of the airspace.

MR. CHRISTOPHER: No further questions.

THE COURT: Cross-examine.

Are those three airports with which you are concerned owned by—well, are they publicly owned or privately?

THE WITNESS: Yes, they are.

THE COURT: All publicly owned?

THE WITNESS: Technically the two New York airports are owned by the City of New York and leased by the Port of New York Authority.

[352] THE COURT: I see.

THE WITNESS: And in the case of Newark, it is owned by the City of Newark and also leased by the Port of New York Authority. But they would come under the definition of a publicly owned facility.

THE COURT: As distinguished from the type of ownership we have here with Hollywood-Burbank being owned by Lockheed?

THE WITNESS: Yes, sir.

CROSS EXAMINATION

BY MR. SIEG:

Q Mr. Pyle, I might have missed it in your earlier testimony, but who exactly supports the Aviation Development Council?

A The airlines serving New York City. Now, sir, I must explain by that this includes not only the American flag carriers but all the foreign air carriers that come in such as Lufthansa, BOAC, Air France and so forth. Then also the Port of New York Authority, which is the operator of the three New York airports.

Q You say also. They support you?

A Yes. As the budget is allocated 25 percent is paid by the Port of New York Authority and 75 percent is allocated among the airlines based on the landing fee formula.

[353] **Q** What service do you render the Port of New York Authority?

A Well, I think I tried to cover that in my answer to other counsel which was that we work on various problems to improve the air commerce to the city and serve the City of New York with due regard to some of the problems that this service creates. Community relations, specifically.

Q You are sort of a public relations agency for the Port Authority?

A No. They have their own public relations, sir. No. I am not in the public relations field as such. I would prefer—and I don't mean to be quibbling—I would prefer to call it public education.

We work more closely with the communities, civic associations, that kind of thing.

It's not PR, classic; PR with the media. I don't know whether this is meaningful. But this is our approach.

Q What exactly stimulated this report dated May 10, 1966, which you addressed to the Honorable Mario J. Cariello?

A Cariello.

Q It is in evidence as Exhibit 55.

A I think the specific instance that concerned me was the statement that he made publicly that he would do [354] all in his power to institute some kind of restriction on night operations from the hours of 12:00 to 7:00 a.m. This was made some time during the late fall or winter of 1965-66, which preceded this period.

So we immediately went to work with that threat over our heads.

Q Were the Cedarhurst case and the Hempstead case in progress at that time?

A The Cedarhurst case had been determined, if I recall correctly. I am not a lawyer, sir, so you will have to bear with me. But if I recall correctly, the Cedarhurst case had been determined. The Hempstead case was in litigation. I believe I am correct.

Q Did you testify in either of those cases?

A No, sir.

Q Have you testified in other cases which you feel that your clients, the group who, as you have indicated, pay approximately 75 percent of the cost of the operation?

A No, I have not.

Q Is this the first case you have testified in?

A Yes, sir.

Q Now, directing your attention to the three airports as you have indicated are under the jurisdiction or at least under the control of the Port of New York Authority, are you familiar with the detailed operations insofar [355] as the Port of New York Authority is concerned, what they do in reference to providing rules and regulations for the use of those airports?

A Would you be referring to the tariff and the conditions?

Q I am thinking in terms of rules and regulations at the moment.

A I am in general familiar with them, yes.

Q Yes.

A Yes, sir. This is—I might explain, though, that this is a relationship between the individual carrier and the airport operator with which we do not get involved. I just want to be sure you understand.

Q Well, let me ask you this: Maybe I misunderstood. Is the Port of New York Authority the airport operator of the three airports which you mentioned?

A Yes, it is.

Q Now, you are aware, I assume, that the Port Authority has imposed noise limitations on aircraft using the airport?

A Very definitely.

Q What are those limitations?

A Well, the basic limitation is an aircraft shall not exceed 112 pndb at the monitoring point, which is—I guess could be best described as placed at the nearest—at [356] the point nearest to the runway where there is a residence. In other words, at the end of the Runway 31 left at Kennedy there are some houses about a mile and a half out. There is a monitor at a

point which approximates the closest house to the end of the runway.

A Do I make myself clear?

Q Yes, I believe you do. Now, you say there is approximately a mile and a half between the—

A I believe that's—

Q —end of the runway and these residences?

A A mile and a half or a mile.

Q Somewhere in there. Over a mile?

A Between a mile and a half or two. I don't remember the distances in each case.

Q What occupies that space in between?

A As I recall, it's marsh and open water.

Q And the reading is taken at the point or near the point where these residences are located?

A Yes, sir.

Q May I inquire, if you know, who owns this area, this no-man's land that you have indicated between the—

A I think it is open water and marsh land. There is no development there is no—I think the only way you could put anything in there would be to fill it.

[357] Q Well, are you indicating that the closest residence, then—we are speaking of what? The Kennedy Airport?

A Yes.

Q The closest residence to that airport is something between a mile or a mile and a half and a mile and three-quarters?

A On that particular runway. Runway 22 left, I would say there are houses almost—about a mile from the threshold of the runway.

Q When you say threshold, is that the—

A The start of the runway.

Q Start of the runway.

A This is in approach.

Q Are you familiar with the runways at the Hollywood-Burbank Airport?

A No, sir; I am not.

Q You have never seen them?

A Well, let me, sir—to be truthful, I have flown in there three times, I believe, as a pilot, twice late at night and as a result I am not too familiar with it.

Q Based on the background that you have had in aviation, and assuming you had the authority to approve or disapprove, would you believe that a runway which terminates very close to the airport property and is within one-quarter of [358] a mile of residences would be not subject to regulation in some form, either noise or other means to prevent a nuisance to the adjoining residents?

A Can I rephrase that question?

MR. SIEG: You may. It is pretty involved.

THE WITNESS: So I understand it. Are you asking me—and I am not trying to put words in your mouth. Are you asking me as to whether I feel a runway of the type you have described, which I would gather is within a house—residences within a quarter of a mile of the airport should have some regulation as to its use?

BY MR. SIEG:

Q As to the noise level or some other regulation that would give the adjacent residents some relief.

A No. My approach would not be along those lines as to whether or not there should be a regulation with respect to noise. I would be concerned as to the safety factors, the intrusion of housing, buildings, chimneys, TV antennas into the flight path of the aircraft.

However, it would seem to me that in that particular case there is a responsibility with respect to the use of that land.

THE COURT: The runway land or the land—

THE WITNESS: No. In the sense of the airport.

[359] BY MR. SIEG:

Q A responsibility for the use of the land outside the airport?

A Outside the airport.

Q Whose responsibility?

A Well, I would think that would have to be a municipal responsibility.

Q Even though the airport is privately owned?

A I don't think the ownership of the airport has anything to do with it.

Q What you are really indicating is somehow the City of Burbank should acquire that land for the private use of Lockheed; is that what you are saying?

MR. CHRISTOPHER: Your Honor, I object to that as calling for testimony that is not relevant to any issue in this case. I have let Mr. Sieg go very extensively on this line. But the questions regarding other regulations or regarding what the City of Burbank should do in some other respect are not in issue here. This is argument, I believe, your Honor.

THE COURT: Yes, it probably is. But he has got so far into it now that I think he ought to be allowed to finish it. Because he has already said what he thinks should be done. Now Mr. Sieg is just elaborating on the question that's already been answered.

[360] So I think he should be allowed to explain. Objection overruled.

THE WITNESS: Could you restate that?

MR. SIEG: Could the reporter read it?

[361] THE WITNESS: Could you restate that, please?

THE COURT: I think you had better restate it. It saves lots of time and I find it is more expeditious.

MR. SIEG: Very well.

Q My question was almost in the form of an answer, but I will try to rephrase it in the form of a question.

If I understood the previous answer, you are saying, in effect, that the City of Burbank should acquire that land for the benefit of Lockheed, a private corporation, is that right, to land outside the boundaries?

MR. CHRISTOPHER: I renew my objection to that question.

THE COURT: Yes. The objection is overruled in the circumstances here. We have gotten into this now.

THE WITNESS: I would not be qualified to comment on that. My simple statement was that I feel there is responsibility on the part of the municipality—

THE COURT: Not to let land be developed too close to an airport, is that what you are saying, in general statements?

THE WITNESS: Yes.

[362] THE WITNESS: Yes.

THE COURT: All right.

THE WITNESS: And—I will stop there.

BY MR. SIEG:

Q If land is already developed in the vicinity of an airport, and then at a later time the pure jet is introduced, and in this case the testimony is it was introduced around 1965 on a commercial basis, would your answer be the same?

MR. CHRISTOPHER: Your Honor, I will object to that question again and add to my objection that I don't understand the form of the question.

THE COURT: Well, I think we are getting far afield from the issue here, as to what may be the opinion of Mr. Pyle. I can't see that that is going to be the determining factor here. He has given his opinion that he thinks land shouldn't be developed up to an airport.

MR. SIEG: I will withdraw the question, your Honor.

THE COURT: I think we are getting a little far afield. I don't think it is going to answer the question that I am going to have to answer, as to what his opinion might be.

MR. SIEG: That is right. I will conclude my cross examination.

[363] THE COURT: The noise abatement or the limitations on noise you referred to, Mr. Pyle, as having been imposed by the Port Authority in New York, how is that noise abatement accomplished?

Is it by the construction of the engine or is it by the fuel consumption?

THE WITNESS: Your Honor, if I understand your question, sir, the mechanism is a monitor, a microphone, which measures decibels.

THE COURT: Decibels, is that what it measures?

THE WITNESS: Yes, 112 pndb, which is a weighted decibel. It is weighted—

THE COURT: It isn't the one you would say is to hear a voice, it is weighted?

THE COURT: Yes, it is weighted because of certain frequency spectrums.

THE COURT: Yes.

THE WITNESS: This then is reported. Now, what the aircraft company, airline, has to demonstrate to the Port Authority is that they are going to operate a DC-8 stretch or straight or 707 or whatever it may be, has to demonstrate it can operate that at full gross load and not exceed 112 pndb as it passes over the monitor.

This is a part of the agreement or the [364] tenant-landlord relationship, with respect to the airline or the tenant of the airport under which the Port says, "Okay, you can operate that airplane if you demonstrate to us it meets this criteria."

Does that answer your question?

THE COURT: Well, yes, partly. I would assume that you have accomplished some limitation over what the noise was before? You set up this equipment and said, "You have to operate within a certain number of decibels"?

THE WITNESS: Yes, I think the answer is—

THE COURT: You have improved it.

THE WITNESS: Yes, we have.

THE COURT: You have lowered it from what it was before this rule went on.

THE WITNESS: Well, if I could go back in the history to answer this a little bit.

Mr. Austin Tobin, who is the executive director of the Port Authority, came to me when I was in the CAA and told me the concern he had for the noise from aircraft. This was in 1955—'56. I had just come into the CAA.

It was out of this conversation that the suppressors to which Mr. Von Kann referred this morning were born, because the straight turbo jet aircraft—for example, [365] the KC-135 has a straight jet, no sup-

passer on it. The Port Authority won't let them within
ten miles of Kennedy Airport.

THE COURT: When was this rule imposed, this
limitation?

THE WITNESS: It was imposed at the time the jets
came in and it was a part of the contract between
each airline and the Port Authority in 1958.

THE COURT: I was laboring under the impres-
sion this was something more recent.—

THE WITNESS: No, sir.

THE COURT: —and somehow you had required
them to limit the noise and that they were able to do
it and I was wondering how they did it.

I understand now that this rule came in, and as a
result of this rule the suppressors were put on the
turbo jets.

THE WITNESS: Basically, basically. The rule came
after the suppressors, but the airlines were on notice
that they would have to meet this requirement and
they went to the manufacturers and the manufacturers
designed the suppressors and—

THE COURT: There has been no limitation of noise
in the last five or six years?

THE WITNESS: At the New York airports?

[366] THE COURT: Yes.

THE WITNESS: No, sir.

THE COURT: No reduction in what it was as
imposed in—when?

THE WITNESS: 1958.

THE COURT: You have required no further limi-
tation—

THE WITNESS: No.

THE COURT: —than that imposed then?

THE WITNESS: No.

THE COURT: And that limitation was complied with by virtue of the suppressors, in essence?

THE WITNESS: That is correct. And when we finally—when the carriers adopted the turbo fan, which is the type of modified jet engine, to which General Von Kann referred, they were able to achieve this 112 pndb or not to exceed it with the turbo fan without any modification.

The very nature of the engine plus the additional thrust that it had made it possible to meet these requirements.

THE COURT: All right. Anything further?

MR. PACKARD: Yes, there is one question I would like to clear up.

You referred to the fact that the KC-135 [367] did not have the suppressors, and that is a military version of the 707, is it not, sir?

THE WITNESS: Yes.

MR. PACKARD: And that is a military plane.

THE WITNESS: Yes.

THE COURT: Anything further, now?

MR. CHRISTOPHER: Yes.

REDIRECT EXAMINATION BY MR. CHRISTOPHER:

Q Among the types of noise abatement techniques or procedures, what is your estimate of the value of preferential runways as a noise abatement technique?

A Well, with respect—let me respond by pointing out that in our case the preferential runway system is one of the most important factors in noise abatement that we have, the single most effective weapon we have in noise abatement.

THE COURT: You run them out over the water first and then run them down the coast or up the coast

as they don't come over the city, is that what you are saying?

THE WITNESS: Basically, your Honor, but it gets very complex. There are many, many versions of this and there are many reasons why it cannot be put in, certain weather conditions, wet runways, and so forth.

But the idea is to keep the aircraft from [368] overflying residential areas to the maximum extent possible. That is a very simple statement.

THE COURT: Yes.

MR. CHRISTOPHER: Your Honor, I would like to hand Mr. Pyle a copy of Exhibit in evidence No. 30, which is the noise abatement order which is effective at Hollywood-Burbank Airport, and ask him to read aloud paragraph 5c.

THE WITNESS: "Traffic and weather permitting, use runway 25 for departures of turbine powered aircraft as much as possible during period from approximately 2300 to 0700 local time when people are asleep (residential area is less dense and further from end of runway west of 25 than south of 15)."

BY MR. CHRISTOPHER:

Q Now, is that a version of a preferential runway procedure?

A I would so interpret it.

Q And without trying to get too deeply involved in the Burbank situation, would you think that there would be value in that kind of a procedure, if it took the planes out over a relatively uninhabited area?

A Very definitely.

Q In the course of your testimony, Mr. Pyle, [369] you said you did not recall any instance of the limitation of hours of flight being imposed by federal au-

thorities, except perhaps for relationship with military flights.

In that connection I would like to call your attention to Exhibit No. 48, which is the high density traffic airport rules, subparagraphs (a) and (b) of Paragraph 93.123.

Your Honor, this is on page 3 near the bottom of that exhibit.

THE COURT: Which column is it?

MR. CHRISTOPHER: 93.123, and it starts in the middle.

THE COURT: I see it, the middle column.

THE WITNESS: That is (a) and (c)?

BY MR. CHRISTOPHER:

Q No, (a) and then it comes over here to (b).

A "Each of the following airports is designated as a high density traffic airport, and, except as provided in Paragraph 93.129 and Paragraph (b) of this section, or unless otherwise authorized by ATC, is limited to the hourly number of allocated IFR operations (takeoffs and landings) that may be reserved for the specified classes of users for that airport:"

[370] Then there is a table.

Q Will you read out the table as well as you can?

A The table is entitled "IFR Operations Per Hour."

"Class of user" and then it has "John F. Kennedy Airport" and I think I ought to go through John F. Kennedy Airport first.

Air carriers except air taxis are allocated 70 operations. Scheduled air taxis five and other six.

Q That is operations per hour?

A Per hour, yes.

La Guardia Airport, 48 for air carriers, scheduled air taxi six and other six.

Newark Airport, 40, scheduled air taxis 10 and other 10.

O'Hare Airport, 115, scheduled air taxis 10 and other 10.

Washington National Airport, 40 for air carriers, scheduled air taxis 8 and other 12.

"(b) The allocations of reservations under paragraph (a) of this section among the several classes of users do not apply from 12:00 midnight to 6:00 a.m. local time, but the total hourly limitation remains applicable. The allocations of reservations under [371] paragraph (a) of this section at John F. Kennedy Airport do not apply from 5:00 p.m. to 8:00 p.m. local time. During those hours, the total 80 reservations are allocated to air carriers except air taxis. In the case of Washington National Airport only, the allocation of 40 reservations under paragraph (a) of this section does not include extra sections of scheduled air carrier flights, charter or other non-scheduled flights of scheduled or supplemental air carriers which may be conducted without regard to the limitation of 40 reservations. Any reservation under paragraph (a) of this section allocated to, but not taken by, scheduled or supplemental air carriers operations is available for a scheduled air taxi operation. Any reservation under paragraph (a) of this section allocated to, but not taken by, an air carrier (scheduled or supplemental) or scheduled air taxi operation is available for other operations."

[372] Q. Mr. Pyle, you are generally familiar, aren't you, with high density airport rules?

A. Yes, I am.

Q In view of those, and having recalled them, having read them out, would you not want to add that as an instance in which the Government has imposed a limitation on the hours of flying?

A Well, I would consider it more—and this is not to quibble—but I would consider it more an allocation on operations during certain periods of the day. It addresses itself to the question of peak-hour operations.

In order to prevent delays and to eliminate congestion, they have to be spread. They cannot run more than a certain number of operations.

Q So you would be saying, then, that the Federal Government does and has gotten into the area of limitation on operations at least in this instance?

A They certainly have, without question.

Q Would you consider that as an aspect of air-space management?

A Absolutely. That's the whole intent of that regulation.

MR. CHRISTOPHER: No further questions, your Honor.

THE COURT: All right.

[373] Anything further, now?

MR. SIEG: No, your Honor.

THE COURT: Very well. We will take our afternoon recess now for about ten minutes.

Is Mr. Pyle excused?

MR. SIEG: Yes, your Honor.

MR. CHRISTOPHER: Yes, your Honor.

THE COURT: Thank you.

(Recess taken.)

THE COURT: Very well. Call your next witness.

MR. CHRISTOPHER: Your Honor, the intervening plaintiff and, I believe, the plaintiffs are ready to rest and do so, your Honor.

MR. TYLER: That is correct, your Honor.

THE COURT: Proceed.

MR. SIEG: Your Honor, the defendants would like to call as their first witness Mr. Lemmer.

THE COURT: Very well.

ROMAN LEMMER,

called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated.

Please state your name for the record.

[374] THE WITNESS: Roman Lemmer, R-o-m-a-n L-e-m-m-e-r.

DIRECT EXAMINATION

BY MR. SIEG:

Q Will you state your business or occupation, please, Mr. Lemmer?

A I am chief controller of the Hollywood-Burbank Tower working for the Federal Aviation Administration.

Q How long have you occupied that particular position?

A Since November 1965.

Q Where were you prior to that time?

A Prior to that time I was in our Western Regional Office on West Manchester in Los Angeles.

Q Will you describe to the court the nature of the duties of your present position?

A Well, we have the primary responsibility of providing traffic control, separation of aircraft and expediting the movement of aircraft at Hollywood-Burbank Airport as far as IFR and non-IFR aircraft are concerned, and the movement of IFR or instrument flight aircraft in and out of Van Nuys Airport.

And a certain percentage of the overhead traffic that flies in and out of the Los Angeles International.

[373] Q In the course of the—

THE COURT: I don't believe the record shows what IFR is.

THE WITNESS: IFR is instrument flight rules.

THE COURT: Yes.

BY MR. SIEG:

Q I will pursue that just a little further. Which is the IFR runway at Hollywood-Burbank Airport?

A The reference of IFR runway is generally applied to the runway of an airport that is best equipped with air navigation aids for landing under those conditions, and at Hollywood-Burbank Airport that happens to be Runway 25—correction—Runway 7.

Q Runway 7?

A Right.

Q This is for the landing of aircraft?

A That's for the landing of aircraft under minimum weather conditions. There are circumstances under which IFR aircraft can land on other runways than the IFR runway.

Q But, generally speaking, Runway 7 is the runway used for this purpose at Hollywood-Burbank?

A That is correct.

THE COURT: And 7 is west to east?

[376] THE WITNESS: Landing from west to east on the east-west runway.

BY MR. SIEG:

Q Now, while that Runway 7 is being used for that purpose can Runway 25 be used for landing or takeoff of aircraft?

A No, it cannot.

Q Now, reference has been made throughout these proceedings to an order.

THE COURT: Before we leave that, you say when it is being so used. You mean when it is being used for instrument landing?

THE WITNESS: That's right.

THE COURT: Well, how—

THE WITNESS: You cannot land or take off in the opposite direction, which is the way I understood the question he asked.

THE COURT: Yes. It is used for instrument landing only in bad weather?

THE WITNESS: Not necessarily. Generally, yes. This is generally true, yes.

THE COURT: How much of the time is it used for instrument landing? See, I am at sea. When you say 25 can't be used when it used for instrument landing, that doesn't mean much to me unless I get some idea of the [377] period of time that it can't be used, that 25 can be used, because 7 is being used for instrument landing.

THE WITNESS: I would say that Runway 7 is used for instrument landings perhaps about 12 percent of the time, 12 to 15 percent of the time.

MR. CHRISTOPHER: Your Honor, may I ask for a clarification of that? He said 12 or 15 percent of the time. Does he mean 12 to 15 percent of the landings?

THE WITNESS: Okay. I'll qualify it.

THE COURT: The time, he said.

THE WITNESS: That perhaps should be clarified. I would say, taking our total operations as 100 percent, the utilization of the runways on 100 percent basis, 12 percent of that utilization or 12 to 15 percent are landings on Runway 7.

MR. SIEG: Does your Honor wish to pursue this?

THE COURT: No, no, I'm finished. Excuse me.

BY MR. SIEG:

Q Reference has been made, as you probably noted, through these proceedings to an order issued by you, dated September 4, 1969. It is numbered BUR 7100.5B. Are you familiar with that order, Mr. Lemmer? It has reference to Informal Runway Use Program—Noise Abatement.

[378] THE COURT: Is that 48, Exhibit 48?

MR. SIEG: No, your Honor. This is 30.

THE COURT: 30. Exhibit 30.

BY MR. SIEG:

Q Did you answer the question?

A Yes. I am fairly familiar with it. I don't know it verbatim, but I am fairly familiar with the contents.

Q Will you indicate what caused you in particular to issue this order in place of the previous existing order?

A If I remember correctly, the changes in that order over the previous one were primarily a request that we utilize Runway 7 more often for landings of large turbojet aircraft whenever traffic and weather permitted.

THE COURT: 7 or 25?

THE WITNESS: 7 for landing.

THE COURT: I see.

THE WITNESS: And in addition to this, to use Runway 25 for takeoffs between 11:00 p.m. and 7:00 a.m. as much as practicable, weather and traffic permitting, so as to send our departures out during those hours westbound rather than southbound over the residential area to the south from which quite a few complaints were being generated.

[379] BY MR. SIEG: At Bureau did you think the Bureau

Q At whose request was this?

A We did that on our own initiative. I instituted this because it is my responsibility—part of my responsibility to control the traffic in a manner that will create the least amount of disturbance to the community.

Q What I am trying to get at, Mr. Lemmer, is the real motivation. What inspired this? What was going on at the time that caused you to take this action?

A Well, we were receiving an increase in the complaints from the people living south of the airport on operations during late hours and at times when possibly we could depart aircraft on some of the other runways.

THE COURT: You say getting increased complaints from the south?

THE WITNESS: South, to the north-south runway,

THE COURT: Yes.

[380] Q What, if any, effect did this directive have as to complaints after it was placed in effect by you, Mr. Lemmer?

A About the only change that I would be able to discern is that we have an increase in the complaints we are getting from the people living west of the air-

Q This would be in the West Hollywood area?

A It would be the North Hollywood area.

Q I am sorry, the North Hollywood area.

A Yes.

Q To what degree was your directive on this noise statement, as to the use of Runway 25 for taking

Q To what extent was it observed by the pilots who

took off during this period from 11:00 to 7:00 a.m.?

A We had very, very good cooperation on the part of the pilots, when we did assign the runway.

Q You mean when you assigned the runway—

A That is right.

Q I take it from that that you weren't always able to assign the runway.

A There were a few occasions where we had wind conditions, say, during those hours that precluded an aircraft taking off to the west. We had an easterly flow of wind—or southeasterly flow of wind, I should say, which would require takeoff on Runway 15 to the south.

[381] THE COURT: Runway 15 to the south?

THE WITNESS: Sometimes during those hours, particularly toward morning, we have an increase in the intensity of the wind and the direction normally at that time of the morning is southeast or east-southeast, which meant if an aircraft took off to the west on Runway 25 you would be taking off with a tail wind and this, of course, is an unsafe practice.

THE COURT: You issued this order to use 25 when possible for takeoff because there was less populated area to the west than to the south?

THE WITNESS: We felt that on just a casual observation of an aerial photograph it appears, from a practical standpoint, there is somewhat more open space to the west than there is to the south.

THE COURT: That was the reason—

THE WITNESS: That was the reason.

THE COURT:—for making it a preferential take-off runway.

THE WITNESS: That is right.

MR. SIEG: I am talking generally now.

Q You say this was a casual observation from an aerial photograph.

A In other words, my responsibility is to try to reduce the community of the noise in whichever way I [382] may find and want to do so. Searching for ways and means to probably reduce the number of complaints, it appeared that by using that runway during such times we might reduce the complaints from west to the airport.

Q Unfortunately it didn't have the effect, it just shifted the area of complaint, is that right?

A The number of complaints we get from the south appears to be still about the same. We have had an increase in complaints from the west.

Q Now, we have had some other discussion, and I hope you can clear this up, Mr. Lemmer, what is the preferential runway at Hollywood-Burbank Airport?

MR. CHRISTOPHER: Your Honor, may I ask for a clarification of that question, as to what time.

THE COURT: You mean as to what time of day or what?

MR. CHRISTOPHER: Yes. Does he mean a preferential runway in the daytime or a preferential runway at night?

MR. SIEG: I am talking generally now.

THE COURT: You can get to it later. Go ahead. The objection is overruled. If you understand the question.

THE WITNESS: I believe I do.

I would like to make a statement first.

[383] The fact that in our business we do not use the term "preferential runway" any more. The Federal Aviation Administration dropped that terminology.

I believe it was in late '67, and in lieu of that use the phrase "noise abatement runway". But from the way the word has been used throughout this hearing, I would on the basis of the assumed definition of it, I would say that our preferential runway is the north-south runway. Taking off to the south and landing to the south under circumstances where an aircraft does not require to land on Runway 7 because of instrument flight rule conditions, and under circumstances which would preclude their taking off or landing on 25 because of the wind conditions.

THE COURT: I don't know whether I am clear or not. You say that No. 7 you consider—that is the one north to south—you consider as a preferential take-off runway?

THE WITNESS: Maybe I don't understand what you people mean by "preferential," because we don't use the term.

THE COURT: They are using it here as preferential for abatement, I assume. At least that is what your order was—

THE WITNESS: My order has no "preferential" phrase in it, as such.

[384] THE COURT: No, but wasn't that the concept of your order?

THE WITNESS: Yes.

THE COURT: I think that is the concept that has been used here. When they say "preferential" they are talking about from an abatement standpoint.

Does anybody disagree with that?

THE WITNESS: The way we use it—

THE COURT: Let's find out how the lawyers have been using it.

MR. PACKARD: I think that is what he stated, that when they use the term "preferential"—

THE COURT: It is used from an abatement standpoint, isn't it, Mr. Christopher?

MR. CHRISTOPHER: Noise abatement runway I would regard as a preferential runway.

THE COURT: Yes, that is the way it has been used.

THE WITNESS: The way we use it is between the hours of 11:00 and 7:00, traffic and weather permitting the pilot is asked to use that runway. If he did not want to for some reason, we would tell him, "This is the noise sensitive runway," which in effect, yes, you can say indicates as being the preferential runway.

In the old days when they used "preferen- [385] —I will explain because maybe I am confused a little bit. We used to have a system they called preferential runway and you assigned to a pilot first the runway that was least noise-sensitive, and then next in sequence to one that is more sensitive, and so forth, to one that is most sensitive, which you would use last, and this was called a preferential runway system.

THE COURT: I think that is what they are talking about here. The preferred runway would be the one least objectionable from a noise standpoint.

THE WITNESS: Wind and weather permitting.

THE COURT: Wind and weather permitting.

THE WITNESS: Okay.

THE COURT: That was 25 for takeoffs, wasn't it?

THE WITNESS: 25 for takeoffs, yes.

THE COURT: Yes. All right. That was the preferential runway, weather permitting, for takeoffs, 25.

THE WITNESS: All right.

THE COURT: All right. Go ahead.

BY MR. SIEG:

Q Which runway do the pilots generally most prefer to take off on?

A We are getting in now to conditions depend-
[386] ing upon the wind again. Normally we have wind out of the southeast—prevailing wind is out of the southeast at Hollywood-Burbank, which requires the takeoff on Runway 15 to the south. This exists most of the time. That is what we call our prevailing wind runway.

Q Where a pilot indicates that he wishes to take off on Runway 15, regardless of the time of the day or night, you do not require him to take off on another runway?

A It is usually the other way around. We assign a runway to the pilot and he indicates whether he accepts it or not. They rarely indicate to us a certain particular runway that they desire to use.

Q You say they rarely do?

A They rarely do, yes. We will assign the runway and then they will usually indicate whether or not it is acceptable.

Q If they say it is not acceptable to them, you assign another runway when available, that, is, Runway 15, if they request it.

A Are you talking about them refusing to accept 25, now, is that what you are saying?

Q Yes, that is right.

A This would be true. If there was no wind and that was a factor, and they refused 25, we would give [387] them 15.

THE COURT: Does that ever happen, that when you assigned 25 that they refused it?

THE WITNESS: It has happened on a few occasions, and these particular occasions were a situation where it was a long flight, a heavy load of fuel and the runway with a calm wind condition is not as good a runway from a safety standpoint as 15 is, for the simple fact that 15 is downhill, it is 900 feet longer and gives the pilot better advantage. There have been a few instances where they required 15 for that reason, and this is understandable.

BY MR. SIEG:

Q Has there ever been a situation where you had to require reduction in the load on the aircraft before permitting them to take off because of this shortness of the runway?

THE COURT: Which one are you talking about now?

MR. SIEG: Either, any.

THE COURT: Any, all right.

THE WITNESS: We do not require reduction, but there have been instances where the carriers have had to reduce their load because of wind and temperature conditions.

[388] The middle of summer, on a hot day, with a calm wind, they cannot take off with as heavy a load as they can under other conditions. That has happened.

MR. SIEG: Your Honor, may I address the court on a matter?

THE COURT: Yes.

Before we leave, could I ask, most of the inflights come in on, let's see, 15—the takeoffs are on 15 and North to south and east to west.

THE WITNESS: Most takeoffs are on those two ways, yes.

THE COURT: So the inflights are in the opposite direction.

THE WITNESS: No, they are the same direction, because you land and take off into the wind.

THE COURT: It's the same direction. So they don't take off, then, west to east where they would go over the City of Burbank.

THE WITNESS: Not too often. There are times we have strong east wind and we have had no choice.

THE COURT: Generally speaking, they go directly over North Hollywood when they are on 7, and—

THE WITNESS: 25, you mean.

THE COURT: Yes, 25. Then on 15 they are over Burbank—

[389] THE WITNESS: They are over Burbank for a short time depending if they are going west. They are over Burbank longer if they are going east or south.

THE COURT: If they are going east, is there any instruction as to how far south they fly before they make their turn?

THE WITNESS: Well, it was brought out earlier in the hearing here the air carrier aircraft which we are concerned with are required to fly on instrument flight rules flight plan. If they are going east or southeast the majority of those flights are assigned an airway which we identify as Victor 186, which originates over Van Nuys, running southeastward, and to join that airway they have got to make a left turn after takeoff within a half mile to a mile, depending on the technique and the power used with respect to the load and type of aircraft he has got.

The airway passes approximately a mile south of the airport. It runs west-northwest to east-southeast.

[390] THE COURT: A mile south of the airport?

THE WITNESS: Approximately a mile south, yes. It runs at an angle.

THE COURT: And it runs west-northwest?

THE WITNESS: Runs roughly from Van Nuys Airport to over the City of El Monte.

THE COURT: Yes. It runs roughly along those tracks? Just south of the Southern Pacific tracks lettered here on Exhibit 1?

THE WITNESS: Just about that direction, but a mile bit further south.

THE COURT: South of the tracks but just about that direction?

THE WITNESS: That direction, correct.

THE COURT: But a mile south of that?

THE WITNESS: Yes.

THE COURT: Excuse me, Mr. Sieg. Go ahead with your new subject. I wanted to ask him that before I left the subject.

MR. SIEG: At the time of my being shown the exhibits that were proposed to be introduced in evidence by the plaintiff, which was a week ago last Friday, the defendants had and proposed to offer into evidence a report made by the City Manager of the City of Burbank with respect to the general aircraft problems and the situations, containing [391] pictures, some diagrams and general informative material.

At that time I agreed that it could be offered in evidence. And I actually offered to provide the plaintiffs with a copy that was in better condition than the one that they showed to me.

On Monday of this week and the day prior to this I found and was served with a revised list of exhibits which eliminated this report. I believe it is of some assistance in this matter. Particularly I would like to ask Mr. Lemmer questions regarding some of the material that he provided for this study.

I would wonder at this point in time if there is any objection on the part of the plaintiff that this report of the City Manager be introduced in evidence as a defendants' exhibit.

MR. CHRISTOPHER: Objection, your Honor, on the ground of hearsay.

THE COURT: Well, I haven't seen the report. I suppose it is hearsay. There are a lot of reports in here that are hearsay. You have the right to make the objection, certainly.

I haven't seen it yet. Have you got the City Manager who can come in and testify?

MR. SIEG: Yes, sir; I can bring him in in the morning.

[392] THE COURT: If it is his report.

MR. SIEG: It is.

Q Mr. Lemmer, maybe I can at least finish with your portion of the testimony, hopefully.

Did you in connection with a study being made by the City Manager provide his office with a chart showing the schedule of—not the schedule but the number of departures in graph form between the various hours at various times of the day and night as prepared by you?

A We provided them with a chart. However, I believe the chart indicated the total operations per hour. I do not believe it was broken down into arrivals and departures. I could be wrong.

Q That is correct. I am not suggesting it did otherwise. Do you have a copy of this?

I will show it to the witness. I don't have any extras.

MR. CHRISTOPHER: Yes, I do.

MR. SIEG: May this be marked for identification Defendants' B, your Honor? It is entitled Total Operations Per Hour 1968.

THE COURT: Defendants' B.

THE CLERK: Defendants' B for identification.

(The exhibit referred to was marked Defendants' Exhibit B for identification.)

[193] THE COURT: Did you say 1968?

MR. SIEG: Yes, your Honor. May I approach the witness with this?

THE COURT: Yes.

BY MR. SIEG:

Q Mr. Lemmer, I show you Defendants' Exhibit B for identification and ask you if you recall providing the office of the City Manager with this particular chart?

A Yes, I do.

Q Insofar as you know, of your own knowledge it accurately portrays certain flight operations by hour per hour for a day?

A Yes; it depicts the volume of instrument operations by hour for 24 hours and total operations per hour for 24 hours.

Q Over what period of time?

A This is an over-all average for the calendar year 1968.

MR. SIEG: May I offer this in evidence, your Honor?

THE COURT: Let me see it, please.

MR. SIEG: I would like to inquire further of the witness regarding what is set forth in the exhibit.

THE COURT: When you say amount of operations?

THE WITNESS: A month. That is a month.

[394] THE COURT: Amount of operations you mean this is a number of operations when you say amount of operations?

THE WITNESS: Yes. Number broken down by the hour for each hour of the 24 hours.

THE COURT: These are the dates, 1:00 to 2:00?

THE WITNESS: 1:00 to 2:00 a.m., 2:00 a.m. to 3:00 a.m., 3:00 a.m. to 4:00 a.m., 4:00 a.m. to 5:00 a.m., 5:00 a.m. to 6:00 a.m., and so on.

THE COURT: On down to 12:00. Then the afternoon?

THE WITNESS: That's midnight down here.

THE COURT: On the right-hand side is from 12:00 noon until 12:00 midnight?

THE WITNESS: Yes.

THE COURT: What do the dots on the graph indicate? The solid line apparently is indicated as to be total operations. Now what are total operations? Do you mean in flights and—

THE WITNESS: That's arrivals and departures, combined total of the two.

THE COURT: And the broken line is—

THE WITNESS: Instrument.

THE COURT:—instrument operations. Those are the—

[395] THE WITNESS: Instrument flight rule operations.

THE COURT: Instrument flight rule operations which you say are—come in on 7?

THE WITNESS: Part of it.

THE COURT: Yes.

THE WITNESS: Instrument operations actually include instrument approaches and other type of operations on instrument conditions. It is not necessarily the number of instrument landings on the airport.

THE COURT: I see. It doesn't include just the landings, then?

THE WITNESS: No.

THE COURT: Well, when you say total operations, though, the heavy line, is that landings and takeoffs?

THE WITNESS: That's landings and takeoffs at Hollywood-Burbank on that.

THE COURT: Instrument landing does not necessarily mean there was a landing and takeoff?

THE WITNESS: That is correct. It could be an instrument landing on a departure out of Hollywood-Burbank, it could be instrument landing or departure of Van Nuys, it could include instrument operation of aircraft on instruments flying overhead into Los Angeles or out of Los Angeles International Airport.

THE COURT: Now, the total operations, is [396] that limited to Hollywood-Burbank?

THE WITNESS: Hollywood-Burbank only.

THE COURT: All right. B is ordered in evidence.

(The exhibit previously marked Defendants' Exhibit B was received in evidence.)

MR. CHRISTOPHER: Your Honor, if I could have a moment to confer with Mr. Sieg I might be able to withdraw my objection to that exhibit and expedite its examination considerably.

May we have a moment, your Honor?

THE COURT: Surely.

MR. CHRISTOPHER: Your Honor, I believe that Mr. Sieg and I have agreed that he can use such portions of this report as he deems necessary for his examination here and obviate the need to call the witness. I am more than willing to cooperate with those re-

THE COURT: All right. The portion, you say, he needs to use of the report, is that what you are saying?

MR. CHRISTOPHER: That's right. He and I have discussed the portions he needs to use and I will not object when he offers those portions.

THE COURT: Very well. Allright. Go ahead.

[397] BY MR. SIEG:

Q Mr. Lemmer, am I pronouncing your name right?

A Lemmer.

Q Lemmer?

A Right.

Q Mr. Lemmer, would you refer to that exhibit? Are you in a position to indicate to the court whether this approximates the general activity as set forth at the Hollywood-Burbank Airport during 1969?

A Yes. I would say it approximates the level of operations per hour that existed during 1969 up to the present time.

THE COURT: That's as distinguished from the instrument operation?

THE WITNESS: Talking about total operations.

BY MR. SIEG:

Q At Hollywood-Burbank?

A Right.

THE COURT: As distinguished from instrument operations?

THE WITNESS: Yes.

THE COURT: Which includes not only Hollywood Airport but other airports; is that right?

THE WITNESS: Well, I understood him to talk about Hollywood-Burbank Airport. Now the instrument [398] operations as far as this is concerned, the volume level is—this is very indicative of what is going on today.

THE COURT: Well, you see you have two lines on the graph, a broken line and a hard line.

THE WITNESS: Right.

THE COURT: The hard line, as I understand it, concerns the operation in and out, flights in and out of Hollywood-Burbank.

THE WITNESS: Correct.

THE COURT: And it includes instrument flights in and out, Hollywood-Burbank?

THE WITNESS: Right.

THE COURT: But only Hollywood-Burbank?

THE WITNESS: Right.

THE COURT: Then the broken graph concerns instrument operations, not necessarily flights in or flights out, but it includes flights in and out of other airports besides Hollywood-Burbank?

THE WITNESS: This is correct. This graph had been made up to complete our work load.

THE COURT: All right.

THE WITNESS: And we wanted to use—the City wanted to use it, which we let them have a copy.

BY MR. SIEG:

Q Now as to the operations shown—and I am [199] interested in whatever line of that graph shows landings and takeoffs at Hollywood-Burbank Airport only—are you able to give the court any percentages as between landings and takeoffs insofar as the period from 11:00 p.m. to 7:00 a.m. in the morning are concerned?

A Percentages in what respect? To the 100 percent for one day and broken down into what part of that?

Q I am trying to get some idea of what portion of the number of flights or operations is shown during the period I mentioned, 11:00 p.m. to 7:00 a.m. were landings and what portion were takeoffs.

A Well, this is not broken down, as I said before—

Q I realize that.

A —to landings and takeoffs. For purposes of discussion I believe you could take the total volume here and divide it in half and say half are landings and half are takeoffs, would be generally applicable to the situation.

Q Do you mean that would be generally true?

A Yes.

Q Is that what you are saying?

A Yes.

Q Now, can you just, for example, trace on your diagram the operations activities at Hollywood-Burbank, landings and takeoffs from 11:00 to 7:00 a.m. by numbers and for each hour?

[400] A As depicted on this my interpolation would be that the total number of landings and takeoffs—

THE COURT: Between 11:00 p.m. and 12:00 p.m.?

THE WITNESS: 11:00 and 12:00.

THE COURT: 12:00 midnight.

THE WITNESS: According to this I would estimate it would be about five.

BY MR. SIEG:

Q All right. Then 12:00 midnight to 1:00 a.m.?

A 12:00 midnight to 1:00 a.m., this indicates about three.

Q 1:00 a.m. to 2:00 a.m.?

A 1:00 a.m. to 2:00 a.m., I would say it indicates one.

Q 2:00 a.m. to 3:00 a.m.?

A About the same.

Q 3:00 a.m. to 4:00 a.m.?

A This is about still the same.

Q And 4:00 a.m. to 5:00 a.m.?

A Slight increase. Could conceivably be two opera-

Q And 5:00 a.m. to 6:00 a.m.?

A I would estimate four.

[401] Q And 6:00 a.m. to 7:00 a.m.?

A 6:00 to 7:00 appears to be about thirteen.

Q As part of your assistance to the City in investigating and studying this particular problem, did you provide the City with photographs, aerial photographs of this particular area surrounding Hollywood-Burbank Airport?

A Approximately a week ago the airport manager asked me if I had some aerial photographs, which I did, and I presented them to him. What he used them for I have no idea.

Q I am speaking back in 1969, when the City Manager was working on this particular problem, do you recall providing photographs of any kind?

A I don't recall that we did, no.

I believe he obtained photographs from the Lockheed Air Terminal Inc. He did not receive any from

MR. CHRISTOPHER: Your Honor, we have no objection to these photographs if they can be fixed as to within an estimated period of years.

Perhaps if I ask the Secretary of the Air Terminal he will be able to fix a date for them and settle the problem.

Your Honor, we are willing to agree that these [402] photographs were taken some time between 1967 and 1969. They are undated.

MR. SIEG: I have no proof of date other than what counsel indicates.

I might show them to the witness for a question as to whether they basically depict the present surroundings and runways of the airport, if that would also help.

There are two photographs, your Honor, showing different views of the airport.

THE COURT: Want them marked for identification?

MR. SIEG: Yes, please.

THE CLERK: Defendants' C and D for identification.

(The exhibit referred to was marked Defendants' Exhibit C and D for identification.)

THE COURT: You are offering them as depicting what?

You are not offering them now, I know, but—

MR. SIEG: Views of the runways and surrounding areas of Hollywood-Burbank Airport, aerial views.

THE COURT: C and D for identification.

BY MR. SIEG:

Q I show you Defendants' Exhibit D for identification, and would you please examine it and generally state [403] to the court what it depicts, in terms of the Hollywood-Burbank Airport and the surrounding area.

A I would say this depicts southern two-thirds of the north-south runway and all of the Valley area to the south of it, to the Santa Monica Mountains, and roughly the eastern two-thirds of the east-west runway—

THE COURT: Before we get away from the north-south runway, you are talking about 15?

THE WITNESS: Okay, let's say the last two-thirds—all excepting the first third of Runway 15.

THE COURT: All right.

THE WITNESS: And the residential area south of —in fact, the entire San Fernando Valley south of it to the Santa Monica Mountains.

THE COURT: That is depicted as it appears today?

THE WITNESS: I would have no idea whether this is equivalent what it depicts today, because I have not seen a photograph such as this before. This is the first one I have seen it.

THE COURT: You have seen the area, haven't you? Don't you see it every day?

THE WITNESS: No, I don't fly over it every day. This is taken from the air.

THE COURT: I haven't seen it. I thought [404] it was from the runway.

THE WITNESS: No.

THE COURT: This is from the air and not from

THE WITNESS: It is an aerial shot. I probably would have stated so.

MR. SIEG: For the moment we will have to leave to the period that has been indicated, '67 to '69.

THE COURT: Well, when you say the north-south runway, you are talking about the runway depicted on the right-hand side of the photograph, is that right?

THE WITNESS: That is correct.

THE COURT: And you say it is the south two-thirds of it?

THE WITNESS: Right, about the first one-third is

THE COURT: And the continuation of the runway to the south takes it into the City of Burbank, is that

THE WITNESS: That is right.

THE COURT: It is pretty hard to tell from this picture where the houses began.

THE WITNESS: This is right.

THE COURT: All right. Do you know how far [405] south of the end of the runway that the homes do start? Homes are first located how far south of the runway, do you know?

THE WITNESS: I believe it is somewhere in the neighborhood of one-third to a half a mile.

MR. SIEG: I am sorry, your Honor, I put in D before I put in C, but I am showing the witness Defendants' C for identification.

THE WITNESS: This is D. (Indicating.)

MR. SIEG: Right.

Q I ask you if you recognize what it purports to show.

A This is an aerial shot of the entire Hollywood-Burbank Airport, taken, I would estimate, approximately from a point one-half mile southeast of the southeast corner of the airport, looking to the northwest, and consequently it shows the entire San Fernando Valley area northward to the Santa Susanna Mountains, and similarly westward to the mountains—or northwestward, rather, I should say. It is looking northwest and north-northwest from a point southeast of the airport.

Q Does it show all the runways at Hollywood-Burbank?

A Yes, it does.

MR. SIEG: I would like to offer this in evidence, [406] your Honor, and then attempt or at least ask the witness to indicate to your Honor the several runways that we have been discussing.

THE COURT: You are offering C, is that right?

MR. SIEG: Yes.

THE COURT: With the stipulation it was taken some time between 1967 and 1969, is that right?

MR. PACKARD: That is right.

MR. CHRISTOPHER: Yes, your Honor, and there is no objection on that basis.

THE COURT: Very well, with that understanding C is ordered in evidence.

(The exhibit previously marked Defendants' Exhibit C was received in evidence.)

BY MR. SIEG:

Q If you please, would you indicate to his Honor the runways we have been discussing, 15, 7, 25, and I have lost the other one.

THE COURT: 33.

THE WITNESS: 15 is this runway to the south, the takeoffs to the south (indicating), for landings to the south.

33 is the reverse for takeoffs to the north, landings to the north (indicating).

25 for takeoffs to the west or landings to the [407] west (indicating).

Runway 7, landings to the east or takeoffs to the east, in that direction (indicating).

THE COURT: Is there any objection to his marking these on here?

MR. CHRISTOPHER: No.

MR. PACKARD: No.

THE COURT: Anyone looking at the record, it wouldn't mean a thing, as to what he is telling me.

I think if you will put a "15" up at the top here of this one, with an arrow showing that "15" means to the south.

THE WITNESS: All right.

THE COURT: And then to the west a "25"—

THE WITNESS: All right.

THE COURT: And 33.

THE WITNESS: All right.

THE COURT: And the "15" coming down.

(Witness complies.)

THE COURT: And the 7, is that right? The 7 going—

THE WITNESS: This is 25 (indicating).

THE COURT: 25 going east to west. And 7 coming west to east.

(Witness complies.)

[408] THE COURT: That makes it meaningful.

What is the area south of 15, at the end of 15 to the south?

THE WITNESS: The residential area starts south of the cemetery, and it only shows half of the cemetery.

THE COURT: In other words, on the left is the cemetery?

THE WITNESS: No, the cemetery is directly in line with the south end of the runway. It looks like it is west—

THE COURT: But it is on the left of the picture.

THE WITNESS: That is correct.

THE COURT: And the plane goes over the cemetery as it comes down on Runway 15.

THE WITNESS: Right.

THE COURT: And takeoff on 15.

THE WITNESS: That is correct.

THE COURT: And then I think you testified that if the plane is going north, then it circles to the right—to the west?

THE WITNESS: If the departure is destined for south of Los Angeles,—

THE COURT: Yes.

[409] THE WITNESS: —then they make a right turn after they become airborne.

THE COURT: Which is to the west.

THE WITNESS: To the west, right.

THE COURT: If the departure is for the east, why, they make a left turn to the east about a mile south of the end of the runway.

THE WITNESS: That is correct.

[410] MR. SIEG: That's all I have of this witness, Your Honor.

THE COURT: Your other photograph you are not concerned with, is that correct?

MR. SIEG: D is in.

THE COURT: No, I don't think it is in.

THE CLERK: No.

THE COURT: I don't think it is in yet.

MR. SIEG: I'll offer it.

THE COURT: Would you do the same thing on D, mark it showing the arrow 15 so we can tell which direction the takeoff would be on 15? And likewise the arrow coming to the north on 33.

MR. CHRISTOPHER: Again, on this one, your Honor, the closest date that we are able to put is between 1967 and 1969. With that stipulation, we have no objection.

THE COURT: Very well. It is ordered admitted with that understanding.

I don't know whether you want to see these or not now we get the markings on them.

Now, isn't this the cemetery down here? This is 15, 7. The cemetery is toward the top of the photograph where the 33 figure is placed?

THE WITNESS: No. The cemetery lies right [411] in here (indicating).

THE COURT: South of the 33 figure?

THE WITNESS: The 33 figure is over the residential area south of the cemetery.

THE COURT: You don't know the distance of the cemetery, how wide it is north to south?

THE WITNESS: I would say, just estimating, a third to a half a mile.

THE COURT: Very well.

Now, have you finished?

MR. SIEG: I have finished my direct examination. (Defendants' Exhibit D for identification was received in evidence.)

THE COURT: Cross-examine.

MR. CHRISTOPHER: No cross examination, your Honor.

MR. PACKARD: No cross.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

Memorandum for Use in Preparation of Proposed Findings of Fact, Conclusions of Law, and Judgment.

Filed: Sept. 24, 1970.

(Title omitted in printing).

The within action is for declaratory relief and injunction whereby the plaintiffs seek to invalidate an Ordinance of the City of Burbank which prohibits the take-off by jet aircraft from Hollywood-Burbank Airport (HBA) between the hours of 11:00 P.M. (2300) and 7:00 (0700), the next day.

The plaintiff Lockheed Air Terminal, Inc., is the owner and operator of HBA. Plaintiff Pacific Southwest Air Lines (PSA) is an intrastate carrier.

The intervening plaintiff, Air Transport Association of America (ATA), is an unincorporated trade association consisting of some 32 carriers commonly known as scheduled airlines. The members of the Association fly approximately 2400 planes, the great majority of which are jet aircraft.

The Federal Aviation Administration (FAA) has filed an Amicus Curiae brief in support of the position of the plaintiffs.

The City of Burbank and certain public officials are named defendants. The People of the State of California (California) filed an Amicus Curiae brief in support of the validity of the Burbank Ordinance (BuOr).

The provisions of Section 1331(a) and 1337 of Title 28, U.S.C., vest this Court with jurisdiction and ven-

The issues of law involved are:

- (1) Has the Federal Government so preempted the fields of the use of air space and the regulation of air traffic as to invalidate and preclude enforcement of the BuOr?
- (2) Is the Ordinance in conflict with Federal statutes or regulations and thereby rendered unenforceable by the Supremacy Clause?
- (3) Would the enforcement of the Ordinance result in intolerable and unreasonable burden on interstate commerce?
- (4) Does the Ordinance constitute an attempted regulation of the phase of the National commerce which, because of the need of National uniformity, demands that its regulation be prescribed by a single authority?

The admitted facts are set forth in the Pre-Trial Conference Order and are as follows:

1. Plaintiff Lockheed Air Terminal, Inc., (hereinafter "Lockheed"), is a corporation organized and existing under and pursuant to the laws of the State of Delaware and is doing business in the County of Los Angeles, State of California. Lockheed, at all times material herein, was and is the owner and operator of the Hollywood-Burbank Airport.

2. Plaintiff Pacific Southwest Airlines (hereinafter "PSA") is a corporation organized and existing under and pursuant to the laws of the State of California and is doing business in the County of Los Angeles, State of California.

3. Intervening plaintiff Air Transport Association of America (hereinafter "ATA") is an unincorporated trade association the members of which include virtually all United States scheduled interstate air carriers. Among its 32 members are the following scheduled air carriers which use Hollywood-Burbank Airport: Air West, Inc.; United Air Lines, Inc.; Western Air Lines, Inc. Among its other members is Continental Air Lines, Inc., which obtained authority pursuant to Civil Aeronautics Board Order No. 70-5-52, issued May 12, 1970, "to engage in air transportation with respect to persons, property, and mail . . . between the terminal point Seattle-Tacoma, Wash., the intermediate points Portland, Oreg., and San Francisco-Oakland-San Jose, Calif. (to be served through the Metropolitan Oakland International Airport and the San Jose Municipal Airport), and the terminal point Los Angeles Ontario-Long Beach-Hollywood-Burbank-Santa Ana-Orange County, Calif. (to be served through the Ontario International Airport, the Long Beach Municipal Airport, the Hollywood-Burbank Airport, and the Orange County Airport)."

4. The City of Burbank is a municipal corporation in the County of Los Angeles, State of California, having power to sue and be sued in its own name;

Dr. Jarvey Gilbert is the duly elected Mayor of the City of Burbank;

Robert R. McKenzie is the duly elected Vice Mayor of the City of Burbank;

George W. Haven, Robert A. Swanson and D. Verner Gibson are duly elected Councilmen for the City of Burbank;

Joseph N. Baker is the City Manager of the City of Burbank;

Samuel Gorlick is the City Attorney for the City of Burbank;

Rex R. Andrews is the Chief of Police of the City of Burbank.

5. The defendants, Gilbert, McKenzie, Haven, Swanson and Gibson, constitute the City Council for the City of Burbank and have the authority to enact and enforce ordinances for the regulation of specified matters within the City of Burbank. Defendant Gorlick and the attorneys within his office have the responsibility of prosecuting violations of ordinances and other misdemeanors within the City of Burbank. The defendant, Rex R. Andrews, as Chief of Police, is responsible for and oversees the enforcement of municipal ordinances including the ordinance here in question.

6. Hollywood-Burbank Airport was dedicated May 30, 1930 and has been in continuous use since that time by both private and commercial aircraft. The Airport provides services to regularly scheduled commercial aircraft as well as to privately owned corporate and general aviation aircraft. Hollywood-Burbank Airport occupies approximately 535 acres, approximately 128 of which are owned by the United States Government. The Airport lies mainly in the City of Burbank and partially in the City of Los Angeles.

7. The City of Burbank has a population of approximately 95,000.

8. On March 31, 1970 the City Council of the City of Burbank duly and regularly adopted Ordinance No. 2216, which added Section 20-32.1 to the Burbank Municipal Code providing as follows:

"Sec. 20-32.1. Aircraft Take-Offs.

"(a) Pure Jets Prohibited from Taking Off Between 11:00 P.M. and 7:00 A.M.

"It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(b) Airport Operator Prohibited from Allowing Take-Offs.

"It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(c) Exception: Emergencies.

"This section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off."

said ordinance became effective on May 4, 1970. The stated purpose of the ordinance is "to prohibit pure jet take-offs at the Hollywood-Burbank Airport between 11:00 P.M. and 7:00 A.M."

9. The defendant officials of the City of Burbank have publicly announced their intention to enforce the new ordinance.

10. As a result of the process of industrialization and urbanization, almost one out of every twenty people in the United States lives in the Los Angeles county area.

11. Hollywood-Burbank Airport is the most convenient airport for the entire San Fernando Valley, Hollywood, and the cities of Burbank, Glendale, Pasadena, and Alhambra, an area containing a population of over 2.2 million persons.

12. Hollywood-Burbank Airport has two principal runways for the operation of aircraft. These runways are designated by their compass heading in tens of degrees.

(a) The "north-south" runway is situated on an axis of 330° - 150° . This runway is designated Runway 33 when it is used by aircraft taking off to the northwest or landing from the southeast, and, Runway 15 when it is used by aircraft landing from the northwest or taking off to the southeast. Approximately 2,050 feet of the northernmost portion of this runway lie in the City of Los Angeles on land owned by the United States Government.

(b) The "east-west" runway is situated on an axis of 070° - 250° . This runway is designated Runway 7 when it is used by aircraft landing from the west or taking off to the east, and, Runway 25 when it is used by aircraft landing from the east or taking off to the west. Approximately 2,250 feet of the westernmost portion of this runway lie on land owned by the United States Government.

(c) Aircraft landing on Runways 7 and 15 and aircraft departing on Runways 25 and 33 do not overfly the City of Burbank.

13. The following types of pure jet commercial aircraft operate from the Hollywood-Burbank Airport: Boeing 727, Boeing 737, Douglas DC-9. The following types of pure jet business aircraft operate from the

airports: Jetstar, Gulfstream II, Sabreliner, Lear Jet, Bellavilland and Falcon.

14. Each scheduled interstate air carrier that uses Hollywood-Burbank Airport holds a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board which provides as set forth in said Certificate.

15. PSA holds a Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission which provides as set forth in said Certificate.

16. Each scheduled interstate air carrier that uses Hollywood-Burbank Airport holds an Air Carrier Operating Certificate issued by the Administrator of the FAA, which provides as set forth in said Certificate.

17. PSA holds a Commercial Operating Certificate issued by the Administrator of the FAA, which provides as set forth in said Certificate.

18. The Administrator of the FAA has issued Operations Specifications to each regularly scheduled air carrier that uses Hollywood-Burbank Airport, which Operations Specifications provide as set forth therein.

19. Air West operates Douglas DC-9 aircraft at Hollywood-Burbank Airport. United has operated and operates the following types of aircraft at Hollywood-Burbank Airport: Boeing 727 and Boeing 737. West operates and has operated Boeing 737 aircraft at Hollywood-Burbank Airport. PSA operates the following types of aircraft at Hollywood-Burbank Airport: Boeing 727, Boeing 737 and Douglas DC-9.

20. Each pilot of a civil aircraft of United States registry operated in the navigable airspace of the United

States is required to have in his personal possession a current pilot certificate issued by the Administrator of the FAA (FAR 61.3(a)). Each pilot of an aircraft operated by a scheduled air carrier at Hollywood-Burbank Airport is required to hold a current air transport pilot certificate issued by the Administrator (FAR 61.161). Each flight engineer of a civil aircraft of United States registry is required to have in his personal possession a current flight engineer's certificate issued by the Administrator (FAR 63.3(b)).

21. Pursuant to newly enacted federal legislation, Hollywood-Burbank Airport is required to apply for an Airport Operating Certificate issued by the Administrator of the FAA pursuant to Section 51(b) of the Airport and Airway Development Act of 1970, Public Law 91-258, Stat. (May 21, 1970), within two years from the date of enactment.

22. The FAA operates the Airport Traffic-Control Tower and Radar Approach and Departure Control at Hollywood-Burbank Airport. In connection with such operation the FAA has expended approximately \$2 million on the installation of navigational aids at Hollywood-Burbank Airport, including the Instrument Landing System ("ILS"), runway and identification lights, and radar and radio equipment.

23. Pursuant to the Federal Aviation Act of 1958, 49 U.S.C. § 1301, *et seq.*, the Administrator of the FAA has determined that there exists a need for a system that will provide adequate separation between and orderly control of the air traffic emanating from points within and without the United States and converging on large metropolitan areas and airports, such as Hollywood-Burbank Airport. Accordingly, the Administrator

has established a system for the control of air traffic which provides for such separation, and which operates within controlled airspace identified as "control zones" and "control areas." Control zones encompass all the airspace from the surface to infinity within five miles of the geographical center of an airport. Control areas are of varying elevations and dimensions, and include the area surrounding Hollywood-Burbank Airport. The airspace within a control zone below an altitude within 2,000 feet above the surface is defined as the airport traffic area (FAR 1.1). Hollywood-Burbank Airport is located under a control area, within an airport traffic area, within a control zone and under many converging Federal airways, all of which have been established by the Administrator of the FAA pursuant to statutory authority. Unless otherwise authorized by FAA Air Traffic Control, a pilot operating within an airport traffic area must maintain two-way radio communication with the control tower (FAR 91.127(b)). He is further required to comply with all clearances and instructions that may be issued by Air Traffic Control (FAR 91.75(b)). Air Traffic Control for the aircraft within the Hollywood-Burbank Airport Control Zone, including approach control and departure control, is exercised by FAA personnel located in the control tower situated at the airport. Except when in direct communication with the control tower, each regularly scheduled air carrier is required to conform its Operations Specifications to operate its jet aircraft in accordance with FAA Instrument Flight Rules ("IFR"). When not under the control of an FAA airport control tower, aircraft operating under IFR are under the direct control of an FAA Air Route Traffic Control Center and are required to comply with the

clearances received from that facility. (FAR 91.115, 91.75(a)).

24. Prior to the commencement of operations involving jet aircraft landings and take-offs on the two runways at Hollywood-Burbank Airport, a determination was made by the FAA that such use of each runway would not be unsafe either to persons or property on the ground or to persons and property in the air.

25. No aircraft may taxi at or take off from Hollywood-Burbank Airport without first receiving an appropriate clearance from Air Traffic Control (FAR 91.87(h)). When a commercial jet aircraft is ready for departure from its terminal gate, it makes radio contact with Air Traffic Control. It is at that time assigned a runway for take-off and is ultimately given clearance to taxi thereto. Prior to taking its position on the runway, the aircraft is given departure clearance, which includes the assignment of departure procedures and assignment of a radio beam intersection to which the aircraft is directed to fly. On receiving its clearance to take off, each jet or other large aircraft is required to conform with all FAA take-off procedures and to climb to an altitude of 1,500 feet above the airport surface as rapidly as practicable. (FAR 91.87(f)) Departure clearances for IFR aircraft incorporate standard instrument departure procedures established for Hollywood-Burbank Airport by the FAA. Pictorial charts showing these standard instrument departure procedures are published by the Department of Commerce, United States Coast and Geodetic Survey. Aircraft taking off from Hollywood-Burbank Airport must conform with the assigned FAA departure clearance including all standard IFR departure procedures incorporated therein (FAR 91.75(a), 91.116). Upon

holding an altitude and position clear of other traffic, control of the aircraft is passed from Hollywood-Burbank Departure Control to the FAA Air Route Control Center located at Palmdale, California.

26. On entering and operating within the Hollywood-Burbank Airport Traffic Area, jets and other large aircraft must be operated at an altitude of at least 1,500 feet except when further descent is required for a safe landing. (FAR 91.87(d)(2)) No aircraft may be landed at Hollywood-Burbank Airport without first receiving an Air Traffic Control clearance (FAR 91.87(b)). In addition to exercising approach control, the FAA maintains and operates an Instrument Landing System ("ILS") which electronically establishes a three-degree glide slope to Runway 7 at Hollywood-Burbank Airport. Each of the aircraft operated by the regularly scheduled air carriers is equipped with electronic devices that monitor the ILS glide slope and depict the glide slope position in relation to that of the aircraft in the cockpit instrument. On receiving FAA clearance to approach for landing, the aircraft is required to be at or above the glide slope at the outer ILS marker and to remain at or above the glide slope until reaching the middle ILS marker. (FAR 91.87(d)(2)) The outer marker is located approximately 6.1 nautical miles from the approach end of Runway 7, while the middle marker is located approximately 1.8 nautical miles from the approach end of the runway. The glide slope altitude at the outer ILS marker is approximately 2,000 feet above the surface and at the middle marker is approximately 575 feet above the surface. As an additional aid of approach control, the FAA prescribes standard instrument approach procedures which are published in Part 97 of the Federal Aviation Regulations. Pictorial

approach and landing charts showing these standard instrument approach procedures are published by the Department of Commerce, United States Coast and Geodetic Survey. Approaches to Hollywood-Burbank Airport conducted under instrument flight rules are required to be in accordance with the standard instrument approach procedures set forth in Part 97 of the Federal Aviation Regulations (FAR 91.116).

27. In the interest of alleviating noise disturbances to the residents of communities adjoining airports located in metropolitan areas, the Administrator of the FAA has established regulations that (1) require turbine powered fixed wing aircraft, approaching for landing, to maintain within the airport traffic area an altitude of at least 1,500 feet above the surface of the airport "until further descent is required for a safe landing," and (2) require such aircraft, when taking off, to climb to 1,500 feet as rapidly as practicable (FAR 91.87(d), (f)).

28. From February 1968 until July 12, 1970, PSA operated a Boeing 727 aircraft which departed the Hollywood-Burbank Airport at 11:30 P.M. each Sunday night destined for San Diego. This was the only regularly scheduled flight taking off from Hollywood-Burbank Airport between the hours of 11:00 P.M. and 7:00 A.M. This was an intrastate flight originating in Oakland, California with its final destination San Diego, California.

29. Since March 9, 1970 PSA has operated a Boeing 727 or Boeing 737 aircraft on charter to Lockheed California Company which aircraft departs from the Hollywood-Burbank Airport Monday through Friday at 6:40 A.M. destined for Palmdale. This flight is being permitted to operate by the City as an emergency flight.

10. Several fleets of corporate jet aircraft use Hollywood-Burbank Airport as their home base. Prior to the enactment of the curfew ordinance, there were at least three flights per week of corporate jet aircraft during the now-prescribed curfew period.

11. Lockheed Aircraft Corporation operates and maintains military defense plant facilities at Hollywood-Burbank Airport.

The plaintiffs urge that the BuOr is invalid for the following reasons:

(a) The preemption of the field of efficient management of the use of the navigable air space by the Federal Government by statute and regulations and through its agencies, FAA and Civil Aeronautics Board (CAB),

(b) The direct conflict between the BuOr and Federal statutes, regulations and Certificates of Public Convenience and Necessity issued to airlines by the CAB, and

(c) The ordinance is an intolerable and unreasonable burden on interstate commerce.

The defendant City of Burbank and its officials and the People of California contend that there has been no preemption in the field of navigable air space control, of limitation of aircraft take-offs by the Federal Government, or its agencies, which would invalidate the BuOr. The City urges that the Ordinance is in reality a "land use" regulation and that Lockheed, as the owner and proprietor of HBA, has the authority to place valid limitations on take-offs of jet aircraft during the curfew and that the City can, in turn, control Lockheed with respect to its land use.

Reliance as to land use is on a statement of the Senate Committee in 1968 to the effect that it was not the intent of the Committee, in recommending the air noise abatement legislation H.R. 3400, to effect any change in the existing apportionment of powers between the Federal and State and local governments and that the authority of units of local government to control the effects of aircraft noise through the exercise of land use planning and zoning powers was not diminished by the bill. S.Rep. 1353, July 1, 1968, U.S. Code, Congressional and Administrative News, 1968, pages 2693-94.

With respect to the Commerce Clause, the defendants argue that in considering the effect of the Ordinance on interstate commerce the Court is limited to the flights out of HBA during the curfew hours and that only the intrastate carrier PSA is involved since that is the only line authorized by the California Public Utilities Commission which has jet aircraft scheduled to take off during curfew. There are privately owned jet planes that fly out of HBA between 11:00 P.M. and 7:00 A.M., but which do not have Certificates of Public Convenience and Necessity from California or CAB.

PREEMPTION.

The House Report 2360, 85th Congress, 2nd Session, on the Federal Aviation Act of 1958, states as to its purpose: "The principal purpose of this legislation is to establish a new Federal agency with powers adequate to enable it to provide for the safe and efficient use of the navigable airspace by both civil and military operations." [Page 3741.]

That Act established the Federal Aviation Agency, now Federal Aviation Administration, in replacement of the then Civil Aeronautics Administration. The FAA

vested with "plenary authority to—(a) Allocate airspace and control its use by both civil and military aircraft."

The Senate Report 1811 on the 1958 Act, after observing that the action of the CAB in its control over airspace allocation and air traffic rules rested for the most part upon " * * * the shifting sands of legal ambiguity", says: "The present legislation proposes to clear away this ambiguity once and for all by vesting unquestionable authority for all aspects of airspace management in the Administrator of the new Agency." The report thereafter states: "The splintering of airspace management in the past through committee and panel negotiation has already been discussed. It is one of the evils which this bill is designed to eliminate. As indicated above, it is for this reason that the bill proposes to vest in a single Administrator plenary authority for airspace management. If such authority is once again fractionalized and made subject to committee or panel decision, the evil will only be continued." In the same report, the Committee observes: "The number of planes seeking their share of our airspace has almost quadrupled since 1938. Furthermore, the larger and faster that aircraft have become, the more airspace is required for each if proper separation is to be maintained."

The defendants rely on *Huron Cement Co. vs. Detroit*, 362 U.S. 440 (1959), as authority for their position that intent to preempt shall not be implied

" * * * unless the act of Congress fairly interpreted is in actual conflict with the law of the State." [Page 443.]

The Supreme Court further observes that in consideration of whether a State law has imposed an undue

burden in interstate commerce, we should be mindful of the fact that the Constitution, when conferring upon Congress the regulation of commerce, did not intend

“* * * to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.’ [Citing cases.] But a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary.” [Citing cases] [Pages 443-44.]

The Detroit Ordinance which was upheld by the Supreme Court involved smoke abatement, and had been violated by one of the ships of appellant company duly licensed to operate in interstate commerce under a regulation enacted by Congress. Air pollution is a local problem and the purpose of the Ordinance was to protect the health and enhance the cleanliness of the local community.

The Court concluded that the mere possession of a Federal license did not immunize the ship from the operation of the normal incidents of police power, not constituting a direct regulation of commerce. Furthermore, the Ordinance did not exclude a licensed vessel from the Port of Detroit, “* * * nor does it destroy the right to free passage.” [Pages 447-48.]

Applying the rules in the *Huron* case to the case at bar, we must determine whether the Federal Government, as evidenced by the acts of Congress and

regulations involved, intends to fully occupy the field of control of the navigable air space to insure its efficient use. Whether the Ordinance brings to bear an unreasonable burden on interstate commerce is also involved and will be discussed in more detail later in this Memorandum.

The question of intent to fully occupy the pertinent field was considered by the Supreme Court in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926). The Georgia statute there involved required curtains and automatic fire-box doors on locomotives. The Court said that the main question in the three cases which were involved on the appeal was whether the Boiler Inspection Act

"* * * has occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation. Congress obviously has power to do so." [Citing cases.]

The Court said that the Interstate Commerce Commission's Boiler Inspection Act applied to locomotives in interstate commerce even if operated wholly within one State and not engaged in hauling interstate freight. The Act did not require any particular type of fire-box door but the Court said that although the Commission had made no other requirement inconsistent with the state legislation that fact was without legal significance.

"It is also urged that, even if the Commission has power to prescribe an automatic fire-box door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commis-

sion has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose. [Citing cases.]”

In answering the question as to whether the Federal Government acted with the intent to preempt a field, the Supreme Court, in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), set forth, in the disjunctive, three tests to be applied:

“So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611; *Allen-Bradley Local v. Wisconsin Employment Board*, 315 U.S. 740, 749. Such a purpose may be evidenced in several ways. (1) The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co. v. Public Service Comm’n*, 250 U.S. 566, 569; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148. (2) Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on

the same subject. *Hines v. Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission*, 236 U.S. 439; *Charleston & W. C. R. Co. v. Varnville Co.*, 237 U.S. 597; *New York Central R. Co. v. Winfield*, 244 U.S. 147; *Napier v. Atlantic Coast Line R. Co.*, *supra*. (3) Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill v. Florida*, 325 U.S. 538. It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide. *Townsend v. Yeomans*, 301 U.S. 441; *Kelly v. Washington*, 302 U.S. 1; *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177; *Union Brokerage Co. v. Jensen*, 322 U.S. 202." [Underscored numbers (1), (2) and (3) added.] Pages 230-31.

In applying the rules in the *Rice* case, *supra*, to the case at bar, we consider the facts and circumstances here involved.

The terms of the 1958 Federal Aviation Act would appear to encompass the efficient use and control of the navigable air space in all aspects of its use by air. Control was effected of the traffic density by regulation 14 F.C.R. 93.121-31, in limiting the instrument flight rules (IFR) operations in high density airports, Kennedy and LaGuardia (N.Y.), Newark (N.J.), O'Hare (Chicago), and Washington National Airport (Wash., D. C.). In limiting the allocations of

flights as to various classes of aircraft, the number of flights varied during different periods of a twenty-four hour day.

By way of comment on the regulations applying to the above named high density airports, it is reported in Federal Register, Vol. 33, No. 234, page 17896, Dec. 12, 1968—part 93, that the allocation of flights was to provide relief from excessive delays, not to correct safety problems. At page 17897, the FAA Administrator says: “* * * the public interest in efficient, convenient, and economical air transportation requires more effective use of airport and airspace capacity. The authority of the FAA to regulate aircraft operations to reduce congestion is clear. The plenary authority conferred by the Federal Aviation Act to regulate the flight of aircraft to assure the safe and efficient utilization of the navigable airspace is well established by practice and judicial decision.”

Congress and the Administrator are fully cognizant of the problems created by aircraft noise. The administrator on page 17897 of the Federal Register, *supra*, refers to the fact that current scheduling practices reflect that two-thirds of the international passenger flights at Kennedy airport were scheduled to arrive or depart between 3:00 P.M. and 11:00 P.M., but that under the allocations imposed some re-scheduling of these flights might be required. He said that international departures fall off abruptly after 10:00 P.M. and *clearly it would not be in the public interest, considering resultant noise disturbances, to encourage scheduling of more flights at later hours.* The paragraphs 93.121-131 of the regulation referred to above appear on page 17898 of Volume 33, Federal Register, *supra*.

In the instant case, the FAA, on September 4, 1969, issued a noise abatement order for HBA making runway No. 25 a preferential runway for departure from 11:00 P.M. to 7:00 A.M. (Bur. 7100.5B, para. 5c, *infra* Ex. 30). This preference was a noise abatement measure for the benefit of the City of Burbank. See Exhibit A hereto for map including the City of Burbank and showing the location of HBA. This map is a portion of plaintiffs' Exhibit No. 1 herein, to which the Court has added the numbered runways 33 and 25 together with the direction of aircraft approach and take-off on all four runways involved.

Further efforts of Congress to control and abate aircraft noise are encompassed in the provisions of Section 1431, Title 49, United States Code, passed by Congress in 1968 and providing for the FAA Administrator to prescribe such rules and regulations he may find necessary to control and abate aircraft noises and sonic boom.

From the broad scope of Federal statutes and regulations governing and controlling the use of air space and of air traffic, it would appear that Congress intended to centralize full and dominant control of the navigable air space in the Federal Government so as to provide for its safe and most efficient use.

Included in the statutes in this field are 49 U.S.C. §§ 1301(24), 1303, 1304, 1341(a), 1348 and 1508.

It is true that Section 1506 of Title 49, U.S.C., states that the provisions of Chapter 20 (Title 49, "Federal Aviation Program") are in addition to the remedies then existing " * * * at common law or by statute." Defendants also point to Senate Report 1353, July 1, 1968, *supra*, wherein it is stated: "It is not the intent

of the committee in recommending this legislation to effect any change in the existing apportionment of power between the Federal and State local governments." Page 2693. It is to be noted that the Senate Report, at pages 2693 and 2694, also states: "The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines v. Town of Hempstead*, 272 F. Supp. 226 (U.S.D.C., E.D., N.Y., 1966). The court said, at 231, 'The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source's H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.'"

In evaluating Section 1506, *supra*, and the statements of the Senate Committee, we must have in mind the rules governing preemption as announced by the Supreme Court and the provisions of the Commerce Clause of the United States Constitution.

In *Chicago & Southern Air Lines vs. Waterman Steamship Corp.*, 333 U.S. 103 (1948), the Supreme Court states at page 107:

"Of course, air transportation, water transportation, rail transportation, and motor transportation all have a kinship in that all are forms of transportation and their common features of public

carriage for hire may be amenable to kindred regulations. But these resemblances must not blind us to the fact that legally, as well as literally, air commerce, whether at home or abroad, soared into a different realm than any that had gone before. Ancient doctrines of private ownership of the air as appurtenant to land titles had to be revised to make aviation practically serviceable to our society. *A way of travel which quickly escapes the bounds of local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past.* [Emphasis added.]

Mr. Pyle, Director of Aviation Development Council at La Guardia airport, New York City, testified: "The approach to the solution of problems in air transportation at the local level just does not work. It has to be done on a national basis because it is a national operation." [R. Tr. 349.] He also stated that air transportation was to be differentiated from surface transportation because of the variance in the degree of flexibility between the two.

In viewing the effect of the BuOr with respect to preemption and the Commerce Clause issues, it appears that the Ordinance should be considered from the national level. The Supreme Court so held as to the railroad in *Chicago vs. Santa Fe*, 357 U.S. 77, 86-87 (1957).

The case of *American Airlines vs. Town of Hempstead*, 272 F. Supp. 226 (D.C., E.D., N.Y., 1966), involved an Ordinance regulating noise levels which devoted the lower air space to aircraft and closed the land-

ing approaches and take-off paths of the Hempstead airport. The court said that the decisive question was whether the Ordinance " * * * conflicted with Federal law, or invades a field of legislation reserved to the National government."

In discussing the test of power to enact the Ordinance, the court states:

"Such an ordinance as Hempstead's cannot be considered in the accident of its particular circumstances. * * * In the perspective of power, the ordinance must be tested as if it were one of a set of ordinances each enacted by a bordering town, and all, taken together, enveloping the airport. Diversion of the airport traffic over another Town would then be impossible and each ordinance would be revealed in its inner nature as a direct regulation of aircraft flight. * * * The question remains, may the municipalities that surround an airport adopt such ordinances as Hempstead's which deny to aircraft those parts of the navigable air space that cannot be used without causing noise on the ground in excess of specified limiting noise spectra.

"* * * legislation, whatever its purpose, that denies access to navigable air space by local rule cannot but be regarded as a plain and forbidden exertion of the power to regulate commerce as such. * * *

"But even if the commerce clause were not thought without more to preclude local action of the kind here involved, the actual exercise by the Congress of the power to regulate in this field is so pervasive as to preclude valid enactment of the Hempstead Ordinance. It would be difficult to vis-

realize a more comprehensive scheme of combined regulation, subsidization and operational participation than that which the Congress has provided in the field of aviation." [Pages 231-32.]

After enumerating the Federal statutes, regulations and activities of Federal agencies in the field of air navigation and traffic, the Court observes:

"The federal regulation of air navigation and air traffic is so complete that it leaves no room for such local legislation as the Hempstead Ordinance." [Citing numerous cases.] Page 233.

At page 235 the Court says:

"Local initiative in noise control of aviation is inherently an effort to regulate a consequence while disclaiming regulation of the cause. It cannot coexist with a comprehensive system of federal regulation of aircraft manufacture (through certificates of airworthiness) and federal regulation of air navigation and air traffic."

VIOLATION OF COMMERCE CLAUSE

Congress is vested with the authority to regulate commerce among the States by Article I, Section 8, Clause 3, of the Constitution. The rule is well established that state and local governments may not unreasonably burden commerce by their acts. The BuOr, while it does not seek to completely deny the use of navigable air space, does seek to eliminate its use by jet aircraft for eight hours of the day.

Continental Airlines, an interstate carrier by virtue of Certificate of Public Convenience and Necessity issued by the CAB on May 12, 1970, Exhibit 9, now serves the Hollywood-Burbank area from the HBA. One of its scheduled routes is from Burbank to Seattle and

return. The evidence shows that if Seattle imposed an ordinance similar to the BuOr no jet aircraft could leave Seattle, or any city in the Northwest, from HBA after 7:00 P.M., nor could a plane depart HBA for Seattle after 7:00 P.M. in order to arrive at the respective destinations before the nocturnal curfew hour of 11:00 P.M. Thus, with such an Ordinance in effect in only two airports the hours of take-off from both airports for flights to and from Seattle would be curtailed to only twelve hours of the day, not eight hours as in this case of the curfew in force at only one of the airports.

The Certificate of Public Convenience and Necessity now issued to scheduled airlines by the CAB authorizes them to fly a specific route or routes and also obligates the line to give *adequate service* to the cities on their routes. [R. Tr. 232.]

General Von Kann, Vice-President, Operations and Engineering, of Air Transport Association of America, testified that a curfew Ordinance, if valid, would be adopted by virtually all types of local airport authorities. [R. Tr. 322.] Mr. Pyle testified in similar vein. [R. Tr. 334.]

The noise problem created by jet aircraft is well known and it appears to the Court that a curfew Ordinance, if valid, would promptly be adopted by virtually all cities surrounding airports. Considered singly, such an Ordinance might not impose an unlawful interference with interstate commerce in all cases. However, considered on a national level, the Ordinance could not stand. Based on authorities discussed hereinabove, the Court concludes, as noted above, that in determining the effect on commerce the Ordinance is to be considered on a national basis. Mr. Mitchell, Vice-Presi-

out of Continental Airlines in charge of corporate planning, Mr. Pyle, and General Von Kann, testified in depth on the effect of such an Ordinance, on a national basis, on interstate commerce as well as on the efficient use of the air space. Some 1009 flights of scheduled airlines would have to be eliminated or re-scheduled. [Exhibit 52, R. Tr. 103-06.] Position problems as to planes would eliminate 1370-odd additional flight operations. [R. Tr. 336.]

Approximately 48% of air mail and 42% of air freight is moved at night. [Exhibit 55, R.Tr. 337-39.] It should be noted that no air mail is flown out of HBA.

If the experience of Continental is average, the Ordinance on a national basis would increase costs by 25% [R. Tr. 261-63] by reason of the loss in the utilization of aircraft as well as the required purchase of new planes to meet the concentration of flights within the permitted hours of take-off, if, in fact, the re-scheduling of flights so eliminated could be accomplished from a practical standpoint. Additional maintenance shops would also have to be established by all airlines to accomplish the required maintenance at necessary locations for proper and efficient use of their planes. [R. Tr. 302-305.]

It appears from the evidence that there would be a very serious loss of efficiency as to the use of air space if a national curfew were imposed. Obviously, if the use of the air space at HBA were curtailed by eight hours per day and this limitation of use time compounded by the adopting of such Ordinance effective as to other airports used by interstate and intrastate airlines, the carriage of interstate passengers and goods would be seriously interrupted and would conflict with

the certificated rights and obligations of such airlines. See *Castle vs. Hayes Freight Lines*, 348 U.S. 61, 63-64 (1954), where the Court held the State of Illinois was without authority to revoke or suspend operations in that state of an interstate motor carrier for violation of a law regulating the weight of loads to be carried on the state's highways. *Southern Pacific vs. Arizona*, 325 U.S. 761, 767 and 775 (1945), where the Supreme Court held invalid an Arizona Ordinance regulating the length of trains, the Court observing that if one state may regulate train lengths so may all others, resulting in a serious impediment to the free flow of commerce.

There is no conflict in the evidence adduced in this case and it should be concluded that air commerce, by reason of its speed and volume, requires a single authority in control if it is to be conducted at maximum safety and efficient use of the navigable air space.

The evidence discloses that air traffic is unique and should be controlled on the national level.

The case of *Stagg vs. Municipal Court of Santa Monica*, 82 Cal. Rptr. 578 (Dec., 1969), is relied on by the defendants in support of their contention that there is no preemption by the Federal Government of the field covered by the BuOr so as to make the Ordinance invalid and unenforceable.

The Santa Monica Airport (SMA), which was involved, was city owned and the California District

Court of Appeals (DCA) held a curfew Ordinance adopted by the City of Santa Monica, which precluded aircraft from taking off from the SMA between the hours of 11:00 P.M. and 7:00 A.M. the next day, to be valid. The SMA is not used by scheduled or intrastate airlines. The Appellate Court reversed the Superior Court's ruling that " * * * the Ordinance was invalid because its subject matter was preempted by State law." The DCA held that the field was not so preempted and in the instant case the Attorney General also asserts non-preemption of the field by the State. At page 579 of its opinion, the DCA, in referring to the Superior Court, says:

"The court found it unnecessary to decide whether there was any federal preemption."

It observes two paragraphs later:

"Preliminarily, it must be recognized that the doctrine of federal preemption has no application here."

The opinion of the DCA, as to preemption, appears to turn on its conclusion that the curfew Ordinance was an unreasonable regulation which only incidentally affected the right of flight but did not impair that right. The Court, after stating its research disclosed no Federal or California enactment which directly conflicts with the Ordinance in question, states:

"The United States by virtue of its sovereignty over navigable airspace has the paramount power to regulate air traffic. Federal statutes, after de-

fining navigable airspace * * *, authorize the administrator to regulate the use of navigable airspace and to establish rules governing the flight, navigation, protection and identification of aircraft." [Page 580.]

The Court did not ground its decision on the proprietary capacity of the city but did discuss the city's rights to regulate its municipally owned airport as a public utility and the authority of the city to regulate the use of the airport under Section 50470-74, California Government Code. [Pages 580-81.]

Loma Portal Civic Club vs. American Airlines, Inc., 39 Cal. Rptr. 708 (1964), a decision of the California Supreme Court in bank, is cited and discussed by the DCA in the Stagg case, *supra*. The members of the Loma Portal Civic Club resided in the flight path of jet aircraft using adjacent Lindbergh Field in San Diego. They sought to prohibit such flights at low altitudes and at such times as to interfere unreasonably with the use and enjoyment by plaintiffs of their homes.

The Court denied injunctive relief but did not find preemption on the part of the Federal Government as a grounds for precluding the relief sought. In denying relief, the Court said:

"It is clear, therefore, that it would be contrary to the policy of this state to grant an injunction against flight operations in the vicinity of a public airport, conducted by regularly scheduled, certificated airlines, not alleged to be conducted in viola-

tion of federal orders and regulations or in an imminently dangerous manner, and not alleged to be carried on in a manner inconsistent with the public interest inhering in the continuation of such service.

* * *

"We hold here that, under the facts of this case, i.e., the operation of aircraft with federal airworthiness certificates in federally-certificated, scheduled passenger service, in conformity with federal safety regulations, in a manner not creating imminent danger, and in furtherance of the public interest in safe, regular air transportation of goods and passengers, an injunction is not available." [Pages 713-14.]

Reference is also made by the Court to the right of landowners who suffer from aircraft annoyances to seek damages from the owner or operator of the aircraft or the owner or operator of the airport involved. It also points out that it is not making a determination with respect to the rights of the parties where private airplanes and airports are concerned. [Pages 714, 715-16.]

The Court, in *American Airlines vs. Town of Hempstead*, 272 F. Supp. 226, *supra*, also discussed the right of landlords to just compensation if overflights are of such a nature as to amount to a taking of property for public purposes. [Page 231.]

Prior to the decision in the Stagg case, *supra*, the City Attorney of Burbank rendered an exhaustive opinion to the Burbank City Manager, dated September 22, 1969, wherein he concluded that the City of Burbank had no power to limit or restrict flights of aircraft utilizing HBA. Copy of the opinion appears as Exhibit A to the supplemental memorandum of points and authorities filed by plaintiffs Lockheed and PSA on May 22, 1970.

The City Attorney now explains that his conclusion was based on the theory that the State of California had preempted the area of restriction of flights and amount of noise emitted by jet aircraft. However, on page two of the opinion, the City Attorney says: "The City of Burbank has no power to establish restrictions on flights or the amount of noise which may be emitted by aircraft using the Hollywood-Burbank airport for the reason that this area of control has been preempted by the State and Federal governments."

The opinion discusses several of the cases cited by counsel on both sides in the case at bar as well as the activities of the Federal Government in the field involved.

In summarizing the opinion it is said, the residents in the vicinity of the HBA should limit their complaints to Lockheed Air Terminal and present their views as to noise to the FAA and the Department of Aeronautics of the State of California and that legislative action can only be accomplished by the Congress of the United States or the State Legislature.

The problems created by noise from jet aircraft are serious and disturbing, to say the least. Effective means has not as yet been found to reduce the noise to desired sound levels. In some airports the required use of certain runways in take-off will send the aircraft out over the ocean or other non-populated areas. However, in the landlocked, thickly populated area in which HBA is located, the use of preferential noise abatement runways is helpful to reduce the noise over Burbank but it merely diverts it to other populated areas. It will be noted from Exhibit A hereto that planes taking off on runway 25 are not over Burbank at any time, and the evidence shows that those taking off on runway 15, with destination to the North, turn West after take-off and are in the Burbank air space but for a very short time.

Our scientific and mechanical expertise has not yet solved the problem of noise resulting from the generation of power by jet engines. However, if the time during which the navigable air space may be used is to be curtailed, the Court concludes that the action must come from Congress, or its authorized agency, if the safe and efficient use of the air space is to be maintained and interstate commerce protected from unreasonable burden and interference.

The plaintiffs are entitled to injunctive relief, as prayed, and for their costs of suit herein.

Plaintiffs' counsel are requested to prepare, serve and lodge proposed Findings of Fact, Conclusions of

Law and Judgment in accordance with the provisions of
Local Rule 7.

This Memorandum is not to be deemed a final judgment. DATED: September 24, 1970.

/s/ E. Avery Crary

E. Avery Crary

United States District Judge

Findings of Fact and Conclusions of Law.

Judgment.

Lodged, 5 p.m., Nov. 25, 1970, Clerk U.S. District Court, Central District of California.

Filed Nov. 30, 1970, Clerk U.S. District Court, Central District of California.

(Title omitted in printing).

The within action having come on regularly for trial on September 15, 1970, before the Honorable E. Avery Crary, Judge presiding, plaintiffs Lockheed Air Terminal, Inc. and Pacific Southwest Airlines being represented by Kirtland & Packard, Robert C. Packard and Winston F. Tyler, intervening plaintiff Air Transport Association of America being represented by O'Melveny & Myers, Warren Christopher, Ralph W. Dau and Bertrand M. Cooper, and defendants all being represented by Samuel Gorlick, City Attorney, Richard L. Sieg, Jr., and Michael R. Murname, except that defendant Samuel Gorlick is represented by Assistant City Attorney Richard L. Sieg, Jr., whereupon evidence both oral and documentary having been introduced by all parties, the cause having been argued and submitted for decision, and the Court on September 24, 1970 having filed its Memorandum for Use in Preparation of Proposed Findings of Fact, Conclusions of Law, and Judgment, whereupon plaintiffs and intervening plaintiff having submitted Proposed Findings of Fact and Conclusions of Law and Judgment, defendants having filed their objections thereto and having requested additional findings, and the Court having heard the argument of counsel thereon;

WHEREFORE, the Court being fully advised in the premises now renders its decision as follows:

FINDINGS OF FACT

1. Plaintiff Lockheed Air Terminal, Inc. (hereinafter "Lockheed"), is a corporation organized and existing under and pursuant to the laws of the State of Delaware and is doing business in the County of Los Angeles, State of California. Lockheed, at all times material herein, was and is the operator of the Hollywood-Burbank Airport and the owner of all but those portions of the Airport described in Findings Nos. 6 and 18 which are held under lease from the federal government.

2. Plaintiff Pacific Southwest Airlines (hereinafter "PSA") is a corporation organized and existing under and pursuant to the laws of the State of California and is doing business in the County of Los Angeles, State of California.

Intervening plaintiff Air Transport Association of America (hereinafter "ATA") is an unincorporated trade association, the members of which include virtually all United States scheduled interstate air carriers. Among its 32 members are the following scheduled air carriers which use Hollywood-Burbank Airport: Air West, Inc.; Continental Air Lines, Inc.; United AIR Lines, Inc.; and Western AIR Lines, Inc.

4. The City of Burbank is a municipal corporation in the County of Los Angeles, State of California, having power to sue and be sued in its own name;

Dr. Jarvey Gilbert is the duly elected Mayor of the City of Burbank;

Robert R. McKenzie is the duly elected Vice Mayor of the City of Burbank;

George W. Haven, Robert A. Swanson and D. Verner Gibson are duly elected Councilmen for the City of Burbank;

Joseph N. Baker is the City Manager of the City of Burbank;

Samuel Gorlick is the City Attorney for the City of Burbank;

Rex R. Andrews is the Chief of Police of the City of Burbank.

5. The defendants Gilbert, McKenzie, Haven, Swanson and Gibson constitute the City Council for the City of Burbank and have the authority to enact and enforce ordinances for the regulation of specified matters within the City of Burbank. Defendant Gorlick and the attorneys within his office have the responsibility of prosecuting violations of ordinances and other misdemeanors within the City of Burbank. The defendant Rex R. Andrews, as Chief of Police, is responsible for and oversees the enforcement of municipal ordinances including the ordinance here in question.

6. Hollywood-Burbank Airport was dedicated May 30, 1930, and has been in continuous use since that time by both private and commercial aircraft. The Airport provides services to regularly scheduled commercial aircraft as well as to privately owned corporate and general aviation aircraft. Hollywood-Burbank Airport occupies approximately 535 acres, approximately 128 of which are owned by the United States Government. The Airport lies mainly in the City of Burbank and partially in the City of Los Angeles.

7. The City of Burbank has a population of approximately 95,000.

8. On March 31, 1970, the City Council of the City of Burbank duly and regularly adopted Ordinance No. 2216, which added Section 20-32.1 to the Burbank Municipal Code providing as follows:

"Sec. 20-32.1. Aircraft Take-Offs.

"(a) Pure Jets Prohibited from Taking Off Between 11:00 P.M. and 7:00 A.M.

"It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(b) Airport Operator Prohibited from Allowing Take-Offs.

"It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(c) Exception: Emergencies.

"This section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off."

and said ordinance became effective on May 4, 1970. The stated purpose of the ordinance is "to prohibit pure jet take-offs at the Hollywood-Burbank Airport between 11:00 P.M. and 7:00 A.M."

9. The defendant officials of the City of Burbank have publicly announced their intention to enforce the curfew ordinance.

10. Almost one of every twenty people in the United States lives in the Los Angeles five-county area. This area is served by scheduled air carriers con-

feeding operations from the Los Angeles International Airport and from four "satellite" airports: Hollywood-Burbank Airport, Long Beach Metropolitan Airport, Orange County Airport and Ontario International Airport.

11. Satellite airports are airports that serve geographical areas immediately adjacent to major metropolitan areas which also have one or more hub or major airport facilities. Other examples of satellite airports are the Oakland International Airport and San Jose Municipal Airport in the San Francisco area.

12. All of the above named satellite airports are surrounded by reasonably well-defined geographical areas which, by reason of the population they serve and their stage of urban development, warrant additional air services in their own right. Many persons living in these various geographical areas find it more convenient and responsive to their needs to have air service provided through their respective satellite airports than to continue their dependence upon the hubs.

13. Satellite airports play an essential role in the national air transportation system in relieving air and ground congestion, in reducing air traffic delays at primary airport centers, and in providing more convenient service to the surrounding population centers, which are of sufficient size and economic power to justify their own air service. This important role has been and is recognized and implemented by the Civil Aeronautics Board in its route investigations.

14. Hollywood-Burbank Airport is an important satellite airport in the national air transportation system and forms a vital link in interstate and intrastate commerce. It is the most convenient airport in the

greater Los Angeles metropolitan area for the entire San Fernando Valley, Hollywood and the cities of Burbank, Glendale, Pasadena and Alhambra, an area containing a population of over 2.2 million persons.

15. The Burbank City Council has on several occasions, and as recently as May 13, 1969, requested and supported additional air transportation services at the Hollywood-Burbank Airport in various route proceedings before the Civil Aeronautics Board and the California Public Utilities Commission.

16. On May 12, 1970, in its Pacific Northwest-California Investigation, Docket No. 18884, the Civil Aeronautics Board determined that additional air service was required between the Pacific Northwest and the Los Angeles metropolitan area. The Board awarded a new route to Continental Air Lines and provided that this additional service be provided through the satellite airports in the Los Angeles metropolitan area, including Hollywood-Burbank Airport. The Mayor and City Council of Burbank expressly requested and supported this award of additional air service at Hollywood-Burbank Airport.

17. Hollywood-Burbank Airport is included in the National Airport Plan promulgated by the Administrator of the Federal Aviation Administration (hereinafter "FAA") pursuant to the Federal Airport Act of 1946, Ch. 261, 60 Stat. 170.

18. Hollywood-Burbank Airport has two principal runways for the operation of aircraft. These runways are designated by their compass heading in tens of degrees.

(a) The "north-south" runway is situated on an axis of 330°-150°. This runway is designated

Runway 33 when it is used by aircraft taking off to the northwest or landing from the southeast, and, Runway 15 when it is used by aircraft landing from the northwest or taking off to the southeast. Approximately 2,050 feet of the northernmost portion of this runway lie in the City of Los Angeles on land owned by the United States Government.

(b) The "east-west" runway is situated on an axis of 070° - 250° . This runway is designated Runway 7 when it is used by aircraft landing from the west or taking off to the east, and Runway 25 when it is used by aircraft landing from the east or taking off to the west. Approximately 2,250 feet of the westernmost portion of this runway lies on land owned by the United States Government.

(c) Aircraft landing on Runways 7 and 15 and aircraft departing on Runways 25 and 33 do not overfly the City of Burbank.

19. Prior to the commencement of operations involving jet aircraft landings and takeoffs on the two runways at Hollywood-Burbank Airport, a determination was made by the FAA that such use of each runway would not be unsafe either to persons or property on the ground or to persons and property in the air.

20. In 1969 there were approximately 32,000 air carrier movements at Hollywood-Burbank Airport serving 1,178,000 commercial passengers in interstate and intrastate transportation. Approximately 97% of these operations were conducted by pure jet aircraft.

21. No air mail is presently carried to or from the Hollywood-Burbank Airport by any air carrier utilizing the airport's facilities.

22. No all-cargo flights are presently operated from the Hollywood-Burbank Airport, although such flights have been operated from the Airport in the past.

23. The following types of pure jet commercial aircraft operate from the Hollywood-Burbank Airport: Boeing 727, Boeing 737, Douglas DC-9. The Administrator of the FAA has issued a type certificate covering each of these types of aircraft. Said type certificates provide that the type to which issued meets the airworthiness requirements of the Federal Aviation Regulations. The following types of pure jet business aircraft operate from the Airport: Jetstar, Gulfstream II, Sabreliner, Lear Jet, DeHavilland and Falcon. Comparable type certificates and airworthiness certificates are required by law in order to operate these business aircraft in air commerce.

24. Each scheduled interstate carrier that uses Hollywood-Burbank Airport holds a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board (hereinafter "CAB"). The certificates issued to Air West and Continental provide that said carriers are authorized to engage in air transportation with respect to persons, property and mail over specified routes into and out of Hollywood-Burbank Airport.

25. Each scheduled interstate air carrier that uses Hollywood-Burbank Airport holds an Air Carrier Operating Certificate issued by the Administrator of the FAA. Said certificates specify that each of said carriers is properly and adequately equipped and able to conduct a safe operation as an air carrier of persons, property and mail in scheduled air transportation between

points authorized in the air carrier's certificate of public convenience and necessity.

26. PSA holds a Commercial Operating Certificate issued by the Administrator of the FAA, which certificate provides that PSA is authorized to operate as a commercial operator to conduct common carrier operations carrying passengers and cargo intrastate on a scheduled basis. PSA holds a Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission.

27. The Administrator of the FAA has issued Operations Specifications to each regularly scheduled air carrier that uses Hollywood-Burbank Airport. Said Operations Specifications provide that each carrier is required to operate turbojet aircraft within the navigable airspace of the United States in accordance with instrument flight rules. The Operations Specifications issued to Air West and Continental provide that said carriers are authorized to use Hollywood-Burbank Airport as a regular airport; the Operations Specifications issued to United and Western provide that said carriers are authorized to use Hollywood-Burbank Airport as an alternate airport. The operations conducted by each scheduled carrier at Hollywood-Burbank Airport are specifically authorized by each carrier's Operations Specifications.

28. Air West operates Douglas DC-9 aircraft at Hollywood-Burbank Airport. United has operated and operates the following types of aircraft at Hollywood-Burbank Airport: Boeing 727 and Boeing 737. Western operates and has operated Boeing 737 aircraft at Hollywood-Burbank Airport. PSA operates the following types of aircraft at Hollywood-Burbank Airport: Boeing 727, Boeing 737 and Douglas DC-9.

29. Each aircraft operated by the regularly scheduled carriers that use Hollywood-Burbank Airport has been issued an Airworthiness Certificate by the Administrator of the FAA which certifies that, as of the date of issuance, the aircraft to which issued has been inspected and found to conform to the Type Certificate therefor and to be in condition for safe operation.

30. Each pilot of a civil aircraft of United States registry operated in the navigable airspace of the United States is required to have in his personal possession a current pilot certificate issued by the Administrator of the FAA.

31. Each pilot of an aircraft operated by a scheduled air carrier at Hollywood-Burbank Airport is required to hold a current air transport pilot certificate issued by the Administrator.

32. Each flight engineer of a civil aircraft of United States registry is required to have in his personal possession a current flight engineer's certificate issued by the Administrator.

33. Pursuant to newly enacted federal legislation, Hollywood-Burbank Airport is required to apply for and obtain an Airport Operating Certificate issued by the Administrator of the FAA pursuant to Section 51 (b) of the Airport and Airway Development Act of 1970, Public Law 91-258, 84 Stat. 219 (May 21, 1970), within two years from the date of enactment in order to continue to serve air carriers certificated by the CAB. Management of Lockheed intends to apply for such a certificate under the regulations to be issued by the Administrator governing application.

34. The FAA exercises centralized management and control over the navigable airspace of the United States. The various Air Route Traffic Control Centers operated by the FAA throughout the United States are assigned responsibility for the management and control of the entirety of this navigable airspace.

35. The Los Angeles Center, located at Palmdale, California, exercises management and control of the airspace in a geographical area of approximately 184,000 square miles which is bounded on the south by the border between the United States and Mexico, on the east by the Colorado River, and which extends from mid-California to the north and 150 miles to sea to the west.

36. Pursuant to a license agreement with Lockheed, the FAA operates the Airport Traffic Control Tower and Radar Approach and Departure Control at Hollywood-Burbank Airport.

37. In connection with such operation, the FAA has expended approximately \$2 million on the installation of navigational aids at Hollywood-Burbank Airport, including the Instrument Landing System ("ILS"), runway approach and identification lights, and radar and radio equipment.

38. The Los Angeles Center has subdelegated control over a portion of its navigable airspace, which portion is for this purpose defined geographically and vertically, to the FAA terminal facility located at Hollywood-Burbank Airport.

39. Pursuant to the Federal Aviation Act of 1958, 49 U.S.C. §1301, *et seq.*, the Administrator of the FAA has determined that there exists a need for a system that will provide adequate separation between and or-

derly control of the air traffic emanating from points within and without the United States and converging on large metropolitan areas and airports, such as Hollywood-Burbank Airport. Accordingly, the Administrator has established a system for the control of air traffic which provides for such orderly control and separation, and which operates within controlled airspace identified as "control zones" and "control areas". Control zones encompass all the airspace from the surface to infinity within five miles of the geographical center of an airport. Control areas are of varying elevations and dimensions, and include the area surrounding Hollywood-Burbank Airport. The airspace within a control zone below an altitude within 2,000 feet above the surface is defined as the airport traffic area.

40. Hollywood-Burbank Airport is located under a control area, within an airport traffic area, within a control zone and under many converging Federal airways, all of which have been established by the Administrator of the FAA pursuant to statutory authority.

41. Unless otherwise authorized by FAA Air Traffic Control, a pilot operating within an airport traffic area must maintain two-way radio communication with the control tower. He is further required to comply with all clearances and instructions that may be issued by Air Traffic Control. Air traffic control over the aircraft within the Hollywood-Burbank Airport Control Zone, including approach control and departure control, is exercised by FAA personnel located in the control tower situated at the airport. Except when in direct communication with the control tower, each regularly scheduled air carrier is required by its Operations Specifications to operate its jet aircraft in accordance with FAA Instrument Flight Rules ("IFR"). When not

under the control of an FAA airport control tower, aircraft operating under IFR are under the direct control of an FAA Air Route Traffic Control Center and are required to comply with the clearances received from that facility.

42. No aircraft may taxi at or take off from Hollywood-Burbank Airport without first receiving an appropriate clearance from Hollywood-Burbank Air Traffic Control. Prior to takeoff, pilots of aircraft that are required to operate under IFR must file their flight plans with the Los Angeles Air Route Traffic Control Center. Every fifteen minutes the FAA computer located at the Los Angeles Center provides updated flight departure information to the appropriate tower facilities and to sectors within the Center. When a commercial jet aircraft is ready for departure from its terminal gate, it makes radio contact with FAA Air Traffic Control. It is at that time assigned a runway for takeoff and is ultimately given clearance to taxi forward. Prior to taking its position on the runway, the aircraft is given a departure clearance, which includes the assignment of departure procedures and assignment of a radio beam intersection to which the aircraft is directed to fly.

43. On receiving its clearance to take off, each jet or other large aircraft is required to conform with all FAA takeoff procedures and to climb to an altitude of 1,500 feet above the airport surface as rapidly as practicable. Departure clearances for IFR aircraft incorporate standard instrument departure procedures established for Hollywood-Burbank Airport by the FAA. Aerial charts showing these standard instrument departure procedures in effect at Hollywood-Burbank Air-

port are published by the Department of Commerce, United States Coast and Geodetic Survey. Aircraft taking off from Hollywood-Burbank Airport must conform with the assigned FAA departure clearance including all standard IFR departure procedures incorporated therein. Control of aircraft crossing the boundary of the airport on takeoff is passed to Hollywood-Burbank Departure Control, which controls the aircraft and provides separation from other aircraft until the departing aircraft is ready to leave the air space subdelegated to the Hollywood-Burbank terminal facility.

44. As an aircraft departs the airspace subdelegated to the Hollywood-Burbank terminal facility destined, for example, for San Francisco International Airport, control of the aircraft is passed from Hollywood-Burbank Departure Control to the Los Angeles Air Route Traffic Control Center located at Palmdale, California. At about Paso Robles, California, control of the aircraft is passed on to the Oakland Air Route Traffic Control Center, which in turn passes control to the FAA terminal facility at San Francisco International Airport as the aircraft enters the navigable airspace subdelegated to that facility. The aircraft then remains under the control of the San Francisco facility until the aircraft has landed.

45. On entering and operating within the Hollywood-Burbank Airport Traffic Area, jets and other large aircraft must be operated at an altitude of at least 1,500 feet except when further descent is required for a safe landing. No aircraft may be landed at Hollywood-Burbank Airport without first receiving an Air Traffic Control clearance, which includes assignment by the FAA of a runway for landing. In addition to exercising approach control, the FAA maintains and

operates an Instrument Landing System ("ILS") which electronically establishes a three-degree glide slope to Runway 7 at Hollywood-Burbank Airport. Each of the aircraft operated by the regularly scheduled air carriers is equipped with electronic devices that monitor the ILS glide slope and depict the glide slope position in relation to that of the aircraft on the cockpit instrument.

46. On receiving FAA clearance to approach for landing, the aircraft is required to be at or above the glide slope at the outer ILS marker and to remain at or above the glide slope until reaching the middle ILS marker. The outer marker is located approximately 6.1 nautical miles from the approach end of Runway 7, while the middle marker is located approximately 1.8 nautical miles from the approach end of the runway. The glide slope altitude at the outer ILS marker is approximately 2,000 feet above the surface and at the middle marker is approximately 575 feet above the surface. As an additional means of approach control, the FAA prescribes standard instrument approach procedures which are published in Part 97 of the Federal Aviation Regulations. Pictorial approach and landing charts showing these standard instrument approach procedures in effect at Hollywood-Burbank Airport are published by the Department of Commerce, United States Coast and Geodetic Survey. Approaches to Hollywood-Burbank Airport conducted under instrument flight rules are required to be in accordance with the standard instrument approach procedures set forth in Part 97 of the Federal Aviation Regulations.

47. During every portion of an IFR flight, the aircraft and pilot are operating under explicit instructions and control of an FAA facility.

48. The navigable airspace in the vicinity of major air terminals across the United States, including Los Angeles, is presently congested. This congestion has resulted in extensive delays at a number of the major airports. This condition exists because the services required by the American traveling public frequently exceed the capacity of the nation's airport system.

49. In exercising centralized management and control over the navigable airspace of the United States, the FAA has as one of its goals the efficient use of such airspace, which includes the expeditious movement of aircraft. The goal of efficient use of airspace, although related, is separate and distinct from the goal of insuring the safety of aircraft.

50. The FAA exerts its power to achieve efficient use of navigable airspace in a variety of ways, including the utilization of flow control procedures and high density airport rules.

51. Flow control is a means of metering aircraft in order to meet any given traffic condition. Flow control restrictions are imposed by FAA facilities from time to time on commercial, business and other aircraft in order to minimize delays resulting from congestion or weather or equipment problems and to accommodate safely the maximum number of aircraft within the Air Traffic Control System. A flow control restriction regulates the number of aircraft that can be accepted within an area and may restrict altitudes and/or routes to be flown during a specified period of time. When an FAA terminal facility or tower encounters a condition which will result in airborne delays of 30 minutes or more, the facility notifies its Air Route Traffic Control Center of this fact. The Center, in turn, will impose a

flow control restriction on adjacent Centers. A flow control restriction obligates the receiving center to (a) clear aircraft on specified routes; (b) establish a separation in time, altitude or distance; or (c) limit the number of departures in a given period by holding aircraft on the ground. Thus the imposition of a flow control restriction by San Francisco can and does result in the Los Angeles Center's holding aircraft on the ground at Hollywood-Burbank Airport.

52. In 1970 the FAA instituted a system of centralized flow control. This system is managed by the FAA Central Flow Control Facility located at Washington, D. C. The Central Flow Control Facility coordinates and supervises the flow of air traffic throughout the Air Traffic Control System to minimize en route delays and achieve the maximum utilization of the air space. Under the new centralized flow control system, prior to imposing a flow control restriction, an Air Route Traffic Control Center must clear the proposed restriction through the Central Flow Control Facility in order to insure that proper coordination may take place within the system.

53. To provide relief from excessive delays caused by congestion at certain of the major airport terminals in the United States, the FAA prescribed High Density Traffic Airport Rules in December 1968, 33 F.R. 17896. These rules, as amended, are presently in effect. These rules designate John F. Kennedy, La Guardia, Newark, O'Hare and Washington National airports as high density traffic airports and restrict the hourly number of IFR operations (takeoffs and landings) at these airports to a specified number. The total number of IFR operations is allocated among various classes of users, namely scheduled air carriers, scheduled air

taxi, and general aviation which includes business aircraft. Although the number of operations allowed varies during different periods of the day, the rules allocate operations for the entire twenty-four hour period. To operate to or from these designated airports, aircraft are required to have an arrival or departure reservation. These rules are intended by the FAA to work in conjunction with flow control procedures described in Paragraph 51.

54. Congress and the Administrator of the FAA are fully cognizant of the problems created by aircraft noise. In allocating the IFR reservations in the High Density Traffic Airport rules, the Administrator specifically had in mind the problem of the noise disturbance that would result from encouraging the scheduling of more flights after the hour of 10:00 P.M.

55. In the interest of alleviating noise disturbances to the residents of communities adjoining airports located in metropolitan areas, the Administrator of the FAA has established regulations that (1) require turbine powered fixed wing aircraft, approaching for landing, to maintain within the airport traffic area an altitude of at least 1,500 feet above the surface of the airport "until further descent is required for a safe landing", and (2) require such aircraft, when taking off, to climb to 1,500 feet as rapidly as practicable.

56. On September 4, 1969, acting pursuant to the authority of FAA Order 7100.13, the FAA Chief of the Airport Traffic Control Tower, Burbank, California issued an order (BUR. 7100.5B) prescribing a noise abatement runway use program at the Hollywood-Burbank Airport. This order makes Runway 25 the preferential runway for departures of turbine powered

craft between the hours of 11:00 P.M. and 7:00 A.M. The preferential runway is assigned by the FAA control tower during these hours by incorporation into an aircraft's departure clearance as an instruction to the pilot. This order designating a preferential runway was a noise abatement measure for the benefit of the City of Burbank. In issuing this order, said FAA Chief was in hand the subject matter of nighttime takeoffs, and, based upon his authority and expertise, acted to minimize the noise consequences of such operations. However, in the landlocked, thickly populated area in which the Hollywood-Burbank Airport is located, the use of a preferential noise abatement runway is helpful in reducing noise over the City of Burbank, but such use merely diverts the noise to other populated areas.

57. Where possible, the FAA has developed standard instrument departures which are assigned between the hours of 11:00 P.M. and 7:00 A.M. in order to reduce noise over residential areas during those hours. Such standard departures are presently in effect at Los Angeles International Airport. In the event that one of these standard departures is not designated in the flight plan filed for a departing aircraft, such departure will be assigned during the indicated hours by incorporation into the aircraft's departure clearance as an instruction to the pilot.

58. The federal statutes and regulations and the orders of the Civil Aeronautics Board and of the Administrator of the Federal Aviation Administration have completely occupied the field of the regulation of the use of the navigable airspace and aircraft operations as to demonstrate that Congress left no room for local regulation such as the Burbank curfew ordinance.

59. Aircraft have such a range and such speed and they involve such technical complexity that they have to be managed on a centralized basis. The transport aviation industry is unique and must be regulated on a national basis, both technically and economically, by the Federal Government. The approach to the solution of air transportation problems at the local level does not work. Regulation on a national basis is required because air transportation is a national operation.

60. The federal statutes and regulations governing and controlling the use of air space and air traffic touch a field in which the federal interest is so dominant as to preclude enforcement of a local ordinance such as the Burbank curfew ordinance.

61. From February 1968 until July 12, 1970, PSA operated a Boeing 727 aircraft which departed the Hollywood-Burbank Airport at 11:30 P.M. each Sunday night destined for San Diego. On the average said flights served about 125 passengers, with an average of 80 being boarded at Hollywood-Burbank. At the time of the imposition of the Burbank curfew ordinance, this was the only regularly scheduled flight taking off from Hollywood-Burbank Airport between the hours of 11:00 P.M. and 7:00 P.M. This was an intrastate flight originating in Oakland, California with its final destination San Diego, California. Both PSA and the traveling public were inconvenienced by the required cancellation of this regularly scheduled commercial flight.

62. Since March 9, 1970 PSA has operated a Boeing 727 or Boeing 737 aircraft on charter to Lockheed California Company which aircraft departs from the Hollywood-Burbank Airport Monday through Fri-

at 6:40 A.M. destined for Palmdale. This flight is being permitted to operate by the City as an emergency flight.

63. Several fleets of corporate jet aircraft use Hollywood-Burbank Airport as their home base. Prior to the enactment of the curfew ordinance, there were at least three flights per week of corporate jet aircraft during the now-proscribed curfew period.

64. Lockheed Aircraft Corporation operates and maintains military defense plant facilities at Hollywood-Burbank Airport.

65. On August 29, 1970, Continental Air Lines commenced regularly scheduled service to Portland and Seattle from the Hollywood-Burbank Airport pursuant to authority granted May 12, 1970, by the Civil Aeronautics Board. These flights are operated utilizing Boeing 727-200 aircraft. In scheduling its flights along this route, Continental did not provide any departures within the Burbank curfew hours.

66. Should sufficient demand develop, Continental anticipates adding another flight from the Pacific Northwest through the Hollywood-Burbank Airport. Such an additional flight would normally be added to depart from Seattle at about 8:00 P.M. in order to provide an even service pattern—morning, noon, dinner-time and after-dinner flights—throughout the day. The Burbank curfew ordinance, however, would restrict Continental from operating a southbound flight departing at that hour. A southbound flight from Seattle through Portland and San Jose, California, to Burbank and on to Ontario can depart Seattle no later than 7:00 P.M. in order not to violate the Burbank curfew.

67. If an 11:00 P.M. to 7:00 A.M. curfew on jet departures were to be enforced at Portland as well as at Burbank, Continental would be restricted from originating flights northbound and southbound along this Ontario-Burbank-San Jose-Portland-Seattle route between the hours of 7:00 P.M. and 7:00 A.M. Only 12 hours of the day would be available for originating such flights.

68. In the event of nationwide imposition of curfew ordinances, Continental would be able to originate departures eastbound on its route from Seattle through Denver, Wichita, Tulsa and Houston to New Orleans only between the hours of 7:00 A.M. and 2:00 P.M. On its Los Angeles through Denver to Chicago route, Continental would be able to originate departures eastbound only between the hours of 7:00 A.M. and 4:15 P.M. The available hours indicated do not take into account any allowance that would have to be made for the delayed arrival problem that would inevitably arise.

69. The problem of noise created by jet aircraft is well known, and it appears that if a curfew ordinance such as that before this Court were held valid, similar ordinances would be adopted by virtually all cities surrounding airports. A curfew ordinance cannot be considered solely in the accident of its particular circumstances because past experience indicates that such local legislation is highly contagious and that its spread to other localities is virtually inevitable if the curfew ordinance at Hollywood-Burbank is upheld.

70. The imposition of curfew ordinances on a national basis would have a near catastrophic effect on the national air transportation system, adversely affect-

the aviation industry, members of the traveling public and the national economy.

71. Continental Air Lines has 48 departures per day on its September 1970 schedule that fall within the curfew hours. If curfew ordinances were instituted on a nationwide basis, Continental would have to cancel all of these flights and would have to cancel flights during non-curfew hours as well because of the problem of positioning aircraft for return flights. These required cancellations would involve approximately 15% of Continental's domestic aircraft miles flown per day.

72. The required cancellation of Continental's night services would greatly inconvenience the traveling public as well as business and industry. Reduced fares on night flights enable many members of the public to travel by air at that time, and the largest proportion of Continental's air mail and air freight is carried at night. To replace the cancelled night service, Continental would have to purchase approximately six new Boeing aircraft at a cost of between \$5,000,000 and \$7,000,000 each. Continental's operating costs would be increased approximately 25% by reason of the reduced utilization of aircraft and the required purchase of additional equipment. These costs would be passed on to the traveling public.

73. There is reason to believe that the imposition of a nationwide curfew would affect the other certified air carriers in a manner and to an extent comparable to the effects upon Continental described in Findings 71 and 72.

74. The Burbank curfew ordinance became effective on May 4, 1970. Between the hours of 11:00 P.M. (local time) on May 4, 1970, and 6:50 A.M. on

May 5, there were 1,000 scheduled departures of pure jet aircraft operated by federally certificated air carriers from all airports in the United States. (International departures and departures by scheduled intrastate carriers and commuter air carriers are not included in this total and would increase the indicated number.) If curfew ordinances such as that before this Court were instituted on a nationwide basis, all of these flights would have to be cancelled. These cancellations would create positioning problems for the airlines, which would result in additional cancellations of flights during non-curfew hours.

75. The scheduling of aircraft is an extremely complex operation. Public convenience must be balanced with equipment and crew availability. In addition, schedules of the various airlines are interrelated due to the need to provide connecting flights. For example, approximately 30% of Continental's domestic business comes from providing connections with other airlines.

76. The scheduling operation is made more complex by the maintenance requirements of the air fleet. Hundreds of component parts must be maintained on a timed basis. The aviation industry performs the required maintenance on its aircraft at night at a limited number of maintenance bases. Continental, for example, has its major maintenance facility at Los Angeles International Airport. Continental's schedules are worked out so that an aircraft can return to this facility every day or two for maintenance. United Air Lines has six maintenance bases, and 12% of its fleet receives required maintenance every night. The imposition of curfew ordinances on a nationwide basis would severely impair the efficiency of the maintenance

system within the aviation industry by requiring the carriers to establish additional maintenance bases, which would involve more equipment and personnel at considerable increases in operating costs.

77. If curfew ordinances were imposed on a nationwide basis, the federally certificated carriers would be required to engage in extensive rescheduling of existing flights. This rescheduling would cause enormous inconvenience and expense to the air carriers and would result in a deterioration in air transportation services to the public.

78. The imposition of curfew ordinances on a nationwide basis would result in a bunching of flights in those hours immediately preceding the curfew. This bunching of flights during these hours would have the twofold effect of increasing an already serious congestion problem and actually increasing, rather than relieving, the noise problem by increasing flights in the period of greatest annoyance to surrounding communities. Such a result is totally inconsistent with the objectives of the federal statutory and regulatory scheme.

79. Based upon a study made at four major airports, it appears that over 48% of the nation's air mail is presently carried by flights departing between the hours of 11:00 P.M. and 7:00 A.M. The imposition of a departure curfew on a nationwide basis would thus cause at least a one-day delay in the delivery of billions of pieces of mail transported annually.

80. The air cargo industry virtually depends for its existence on its ability to operate at off-peak hours. In large measure, the freight is assembled and loaded between the hours of midnight and 2:00 A.M. and then

transported in flights departing in the early morning for distribution at the start of the business day. A study made in 1966 for the Aviation Development Council in New York showed that approximately 42% of the all-cargo services operated by certificated carriers would have to be cancelled if curfew ordinances were instituted on a nationwide basis.

81. Such cancellation would have drastic effects on the business community. For example, most of the cancelled checks that move throughout the country go through the New York Clearing House in one way or another. These checks are brought in by air freight. Because of air freight and because of its ability to move at night, these checks go through the clearing house the following morning. In 1965, according to the study made for the Aviation Development Council, this meant a saving in bank interest of \$34,000,000 per year. Today such saving would be close to \$100,000,000 per year. In addition, the ability to ship parts by air freight has allowed many businesses to effect significant savings by the elimination of large parts inventories formerly maintained at warehouses located throughout the country. This advantage would be lost to companies and their customers if air freight could not move at night.

82. The imposition of curfew ordinances on a nationwide basis would cause a serious loss of efficiency in the use of the navigable airspace. The limitation on the time available for use of the airspace resulting from such imposition would seriously interrupt and impede the carriage of interstate passengers and goods and would conflict with the federally certificated rights and obligations of the air carriers.

13. The evidence is uncontradicted that air commerce, by reason of its speed and volume, requires a single authority if it is to be conducted with maximum safety and so as to achieve efficient use of the navigable airspace.

14. If the use of the navigable airspace were curtailed through the enactment of curfew ordinances on a nationwide basis, interstate commerce would be subjected to an unreasonable burden and interference.

15. Any conclusion of law hereinafter recited which should be deemed a finding of fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter of the action by virtue of 28 U.S.C. §1331(a) and 28 U.S.C. §1337; and jurisdiction over the parties.

2. This action arises under the Federal Aviation Act of 1958, 72 Stat. 737 (1958), as amended, 49 U.S.C. §§1301-1542; the Department of Transportation Act, 80 Stat. 931 (1966), 49 U.S.C. §§1651-1659 (Supp. IV 1969); the Airport and Airway Development Act of 1970, Public Law No. 91-258, 84 Stat. 219 (May 21, 1970); the Constitution of the United States, Article I, Section 8, Clause 3 (the Commerce Clause), and Article VI, paragraph 2 (the Supremacy Clause). The matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs. The allegations of the complaint raise issues constituting an actual controversy concerning which the Court pursuant to 28 U.S.C. §2201, et seq., will make a declaration of rights.

3. All defendants reside in, and the claim arose in, the Judicial District.

4. The Federal Aviation Act of 1958, 72 Stat. 737 (1958), as amended, 49 U.S.C.A. §§1301-1342 (hereinafter the "Act"), established the Federal Aviation Agency, now the Federal Aviation Administration ("FAA"), headed by an Administrator who is made responsible under the Act for the exercise of all powers and the discharge of all duties of the FAA.

5. The Act vests in a single Administrator plenary authority for all aspects of airspace management and specifically charges the Administrator with the dual responsibility of insuring the safety of aircraft and the efficient utilization of the navigable airspace.

6. The comprehensive character of the Act demonstrates that Congress intended to provide the Administrator with the tools necessary to exercise his plenary authority. The United States is declared "to possess and exercise complete and exclusive national sovereignty in the airspace of the United States," 49 U.S.C. §1508(a). Having granted to each citizen of the United States "the right of freedom of transit through the navigable airspace of the United States," 49 U.S.C. §1304, Congress further defined "navigable airspace" as all airspace "above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft," 49 U.S.C. §1301(24).

7. The Act conferred upon the FAA and upon its Administrator broad powers to regulate air commerce in the "public interest." 49 U.S.C. §§1303, 1341(a), 1348. The "public interest" is defined to include "the regulation of air commerce . . . to best promote its development and safety and fulfill the requirements of national defense"; "the control of the use of the navigable airspace of the United States . . . in the interest

safety and efficiency"; "the development and operation of a common system of air traffic control and navigation for both military and civil aircraft." 49 U.S.C. 1303.

8. The powers granted by the Congress are not dormant but have been actively exercised. The regulations of the Administrator are of formidable proportions, impressive detail, and manifest sophistication.

9. The high density traffic airport rules, 14 C.F.R. 93.121-131, which regulate the number of IFR operations at certain major air terminals over the entire 24-hour period of the day, constitute control of the use and management of the navigable airspace by the Administrator to the end of insuring the efficient utilization of such airspace.

10. The system of flow control instituted by the FAA, under which aircraft can be held on the ground in order to reduce airborne delays and congestion, constitutes control of the use and management of the navigable airspace in accordance with the mandate of the Act, which is to insure the efficient utilization of such airspace.

11. To buttress the authority of the Administrator to deal with the question of noise abatement, in 1968 Congress amended the Act to require the Administrator to prescribe such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise.

12. FAA Order BUR 7100.5B, which establishes Runway 25 as the preferential runway at Hollywood-Burbank Airport for departures of turbine powered aircraft between the hours of 11:00 P.M. and 7:00 A.M., constitutes regulation by the FAA on the subject of noise abatement.

13. An ordinance such as Burbank's cannot be considered solely in the accident of its particular circumstances, but must be weighed and tested as if imposed on a nationwide basis.

14. From the broad scope of the Federal statutes and regulations governing and controlling the use of air space and of air traffic, it is apparent that Congress intended to centralize full and dominant control of the navigable air space in the Federal Government so as to provide for the safe and most efficient use of such airspace. The scheme of federal regulation is so pervasive as to demonstrate that Congress intended to preempt the field and to leave no room for local ordinances such as the Burbank curfew ordinance.

15. Air transportation calls for a more penetrating, uniform, and exclusive regulation than is necessary for any other mode of transportation. It is a uniquely national operation in which the federal interest is so dominant as to preclude the enforcement of state or local laws, such as the Burbank Curfew Ordinance, on the same subject.

16. There would be a very serious loss of efficiency, and the statutory objective of efficient use of the airspace as set forth in the Act would be compromised, as a result of nationwide imposition of curfews such as that imposed at Hollywood-Burbank Airport, and accordingly, the City of Burbank has no power to enact the ordinance in issue in this case.

17. Each federally certificated air carrier is authorized and obligated by statute and by its Certificate of Public Convenience and Necessity to provide adequate service over its specified routes. Certificates of Public Convenience and Necessity held by the interstate air carriers cannot be revoked unless the carrier fails to comply with an order of the CAB requiring

violation to a federal rule found to have been violated. The Burbank curfew ordinance, by imposing a local curfew for a period of hours over use of the navigable airspace, constitutes a restriction on carriers in fulfilling their statutory duty and is tantamount to a partial suspension of the Certificates of Public Convenience and Necessity issued to interstate air carriers operating out of Hollywood-Burbank Airport. Said ordinance is therefore in direct conflict with federal law and is void under the Supremacy Clause (Art. VI, Para. 2) of the United States Constitution.

18. The Burbank curfew ordinance conflicts with the exercise of federal sovereignty over navigable airspace, 49 U.S.C. §1508(a), by imposing local control on its use, and, for the same reason, the ordinance conflicts with the federal right of each citizen of freedom of transit through the navigable airspace, 49 U.S.C. §1304, and is therefore void under the Supremacy Clause.

19. Under the Commerce Clause (Art. I, §8, Cl. 3) of the United States Constitution, the states are not deemed to have authority (a) to impede substantially the free flow of commerce from state to state, or (b) to regulate those phases of the national commerce, which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.

20. The nationwide imposition of ordinances such as Burbank's would seriously interrupt the carriage of interstate passengers, mail, and goods and thereby substantially impede the free flow of commerce from state to state, and, considered on such a national basis, such ordinances could not stand.

21. The volume of air commerce, the speed with which it is conducted, the technical complexity of its scheduling and operation, and the limited availability of such of its essential aspects as airports, aircraft, air traffic routes, and aircraft maintenance facilities all make national uniformity of regulations prescribed by a single authority a necessity, so that this phase of the national commerce may be conducted with maximum safety and so as to achieve efficient use of the navigable airspace.

22. Plaintiffs and intervening plaintiff are entitled to judgment on their respective complaints for declaratory relief that each and every part and section of the Burbank curfew ordinance is unconstitutional, illegal and void.

23. Plaintiffs and intervening plaintiff are entitled to a decree that defendant City of Burbank and the individual defendants, and each of them, in their respective capacities as officials of the City of Burbank charged with the enforcement of the provisions of the Burbank curfew ordinance, their respective agents, servants, employees, attorneys and successors be enjoined and restrained by a permanent order of injunction of this Court from taking any action in pursuance of said ordinance.

24. Plaintiffs and intervening plaintiff are entitled to recover their costs of suit herein incurred.

25. Any finding of fact which should be deemed a conclusion of law is hereby adopted as such.

LET JUDGMENT BE ENTERED ACCORDINGLY

Dated this 30th day of November, 1970.

E. AVERY CRARY

United States District Judge

submitted by:

MELVENY & MYERS
WARREN CHRISTOPHER
RALPH W. DAU
BERTRAND M. COOPER

Attorneys for Intervening Plaintiff

Warren Christopher

APPROVED AS TO FORM (x)

DISAPPROVED AS TO FORM ()

ERTLAND & PACKARD

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WINSTON F. TYLER

Attorneys for Plaintiffs

/s/ Winston F. Tyler

Winston F. Tyler

APPROVED AS TO FORM (x)

DISAPPROVED AS TO FORM ()

SAMUEL GORLICK, City Attorney and

RICHARD L. SIEG, JR., Assistant City Attorney

/s/ Richard L. Sieg, Jr.

Richard L. Sieg, Jr.

Attorneys for all Defendants

except Samuel Gorlick

/s/ Richard L. Sieg, Jr.

Richard L. Sieg, Jr.

Attorney for Defendant Samuel Gorlick

RECEIPT ACKNOWLEDGED this 5th day of

November, 1970, at 4:00 p.m.

SAMUEL GORLICK, City Attorney, and

RICHARD L. SIEG, JR., Assistant City Attorney

/s/ Richard L. Sieg, Jr.

Richard L. Sieg, Jr.

Attorneys for all Defendants

except Samuel Gorlick

/s/ Richard L. Sieg, Jr.

Richard L. Sieg, Jr.

Attorney for Defendant Samuel Gorlick

Judgment.

Lodged Oct. 23, 1970.

Filed: Nov. 30, 1970.

(Title omitted in printing).

This action came on for trial before the Court, the Honorable E. Avery Crary, Judge, presiding, and the issues having been duly tried, and Findings of Fact and Conclusions of Law having been made and entered herein, in accordance therewith, and good cause appearing therefor:

IT IS ORDERED, ADJUDGED AND DECREED
as follows:

1. That each and every part and section of the Burbank curfew ordinance, Burbank Municipal Code Section 20-32.1, is hereby declared unconstitutional, illegal and void.

2. That defendant City of Burbank and the individual defendants, and each of them, in their respective capacities as officials of the City of Burbank charged with the enforcement of the provisions of the Burbank curfew ordinance, Burbank Municipal Code Section 20-32.1, their respective agents, servants, employees, attorneys and successors be and hereby are permanently enjoined and restrained from taking any action in pursuance of said ordinance.

3. That defendants pay to plaintiffs the sum of \$..... and to intervening plaintiff the sum of \$..... for their respective costs of suit herein incurred.

DATED: this 30th day of November, 1970.

/s/ E. Avery Crary

United States District Judge

(attorneys' signature lines on following page)

Submitted by:

KIRTLAND & PACKARD

ROBERT C. PACKARD

WINSTON F. TYLER

Attorneys for Plaintiffs

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Attorneys for Intervening Plaintiff

/s/ By Warren Christopher

Warren Christopher

APPROVED AS TO FORM (.....)

DISAPPROVED AS TO FORM (.....)

SAMUEL GORLICK, City Attorney, and

RICHARD L. SIEG, JR., Assistant City Attorney

By

Richard L. Sieg, Jr.

Attorneys for all defendants except

Samuel Gorlick

By

Richard L. Sieg, Jr.

Attorney for defendant Samuel Gorlick

RECEIPT ACKNOWLEDGED this

day of October, 1970, at

o'clock — M.

SAMUEL GORLICK, City Attorney, and

RICHARD L. SIEG, JR., Assistant City Attorney

By

Richard L. Sieg, Jr.

Attorneys for all defendants except

Samuel Gorlick

By

Richard L. Sieg, Jr.

Attorney for defendant Samuel Gorlick

(Affidavit of Service omitted in printing).

**Opinion of the Court of Appeals
for the Ninth Circuit.**

United States Court of Appeals for the Ninth Circuit.

Lockheed Air Terminal, Inc., a corporation, and Pacific Southwest Air Lines, a corporation, Plaintiffs-Appellees, Air Transport Association of America, Plaintiff-Appellee, vs. The City of Burbank, a municipal corporation; Dr. Jarvey Gilbert, Mayor; Robert R. McKenzie, Vice Mayor; Councilman George W. Haven; Councilman Robert A. Swanson; Councilman D. Verner Gibson; Joseph N. Baker, City Manager; Samuel Gorlick, City Attorney for the City of Burbank, and Rex R. Andrews, Chief of Police of the City of Burbank, Defendants-Appellants, No. 71-1242.

[March 22, 1972]

**Appeal from the United States District Court
for the Central District of California**

Before: BROWNING, DUNIWAY and TRASK, Circuit Judges TRASK, Circuit Judge:

Hollywood-Burbank Airport (H-B Airport) is owned and operated by Lockheed Air Terminal, Inc. (Lockheed). It occupies approximately 535 acres, of which 128 acres (including portions of each of its two runways) are owned by the Federal Government. As a satellite airport for Los Angeles International Airport, it is included in the National Airport Plan promulgated by the Administrator of the Federal Aviation Administration (FAA) pursuant to the Federal Airport Act of 1946, 49 U.S.C. § 1101 *et seq.*¹ As such,

¹Private airports which meet the above criteria may be included in the NAP if they are now and will continue to be open to the public, if the facilities are adequate or may be expanded to meet recommended development needs, and if a more desirable location is not evident. Certain high-activity, privately owned

is used by United Air Lines, Western Airline, Air West and Pacific Southwest Airlines (PSA) as an alternative to Los Angeles International Airport when weather conditions at the latter prevent its use. Those airlines, together with Continental Air Lines, also use H-B Airport for regularly scheduled flights.

United, Western, Air West and Continental are interstate carriers and hold Certificates of Public Convenience and Necessity issued by the Civil Aeronautics Board (CAB). PSA is an intrastate carrier and holds a Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission.

H-B Airport is located in a thickly populated area, and is entirely within the City of Burbank except 2,050 feet of the northernmost portion of its north-south runway, which lies in the City of Los Angeles. The north-south runway is the longer and preferred for take-offs. The east-west runway is better equipped with navigation guides for landing under minimum weather conditions. Both runways lead over residential districts in both directions.

In an effort to deal with the adverse environmental effects of jet aircraft at H-B Airport, specifically the problem of noise, the FAA Chief of the Airport Traffic Control Tower at the airport issued a series of runway preference orders. The last one, BUR 7100.5B, issued September 4, 1969, provided that, traffic and weather permitting, the east-west runway (landings from the east, taking off to the west) should be used as much as possible for departures of turbine powered aircraft between 11:00 p.m. of one day and 7:00

airports are also included if a Federal interest has been expressed through provision of facilities such as an air traffic control tower, even though these airports do not necessarily meet the responsibility criteria. Acquisition of such fields by an eligible public body is encouraged wherever possible." 1968 National Airport Plan at 14.

a.m. of the next. Aircraft departing to the west overfly that portion of the City of Los Angeles known as North Hollywood.

"1. **PURPOSE.** This Order prescribes procedures to be followed by Burbank Tower personnel in application of noise abatement procedures.

"4. **BACKGROUND.** The problem of noise in the vicinity of the Hollywood-Burbank Airport has become increasingly serious. More noise complaints are being received. Threats of legal action to be taken to obtain relief from noise are being heard. We need to do everything practicable and within reason to reduce the noise exposure to residents living near the airport. The workload caused in handling and following-up on noise complaints has increased to the point where it occupies a major portion of the administrative workload of the facility. Procedures established for the Hollywood-Burbank airport are designed to reduce the community exposure to noise to the lowest practicable minimum. The procedures are not mandatory on the part of the pilots, however, traffic controllers must be noise abatement conscious and emphasize noise abatement in order to obtain the highest degree of voluntary cooperation from pilots. The area within a 5-mile radius of the Hollywood-Burbank Airport is considered to be a noise-sensitive area.

"5. **PROCEDURES.** The following procedures apply to large (over 12,500 pounds) aircraft and all turbine powered aircraft:

"a. Normally do not assign runway 7 for departures, or runway 25 for arrivals [east-west runway].

"b. Traffic and weather permitting, make every effort to use runway 7 for arrivals of turbine powered aircraft.

"c. Traffic and weather permitting, use runway 25 for departure of turbine powered aircraft as much as possible during period from approximately 2300 to 0700 local time when people are asleep (residential area is less dense and further from end of runway west of 25 than south of 15).

"e. In the event a pilot requests departure on runway 7 or landing on runway 25, honor the request, traffic permitting, but inform the pilot that the runway is 'noise sensitive.' (Residential area closest east of airport.)

"f. These procedures are not intended to incur delays to aircraft or hamper the controller in handling airport traffic. If the traffic situation existing at the time requires the use of runways contrary to these procedures, controllers may deviate from the procedure. Controllers are expected to use good judgment in making this determination.

On March 31, 1970, the City Council of Burbank, in response to continuing complaints about noise from the airport, passed Ordinance No. 2216, which added Section 20-32.1 to the Burbank Municipal Code.¹ That ordinance, which took effect May 4, 1970, prohibited pure jet aircraft from taking off from H-B Airport between 11:00 p.m. of one day and 7:00 a.m. of the next day, and made it unlawful for the operator of the airport to allow such planes to take off at such times. Exception was made for emergency flights where the City Police Department was contacted and the Watch Commander on duty approved. The express purpose of this ordinance was to abate the serious environmental problem caused by the taking off of pure jet aircraft during sleeping hours.

One regularly scheduled flight was affected by the ordinance—an intrastate flight of PSA which originated in Oakland and departed from Burbank for San Diego at 11:30 p.m. each Sunday night. The other flights affected were principally departures of corporate aircraft.

Lockheed and PSA brought suit in the United States District Court for the Central District of California on

(a) Pure Jets Prohibited from Taking off Between 11:00 p.m. and 7:00 A.M.

It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

(b) Airport Operator Prohibited from Allowing Take-Offs.

It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

(c) Exception: Emergencies.

This section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off."

May 14, 1970, against the City of Burbank and certain of its officers, seeking declaratory and injunctive relief on the ground that the Burbank ordinance is unconstitutional. Air Transport Association of America, an unincorporated association of scheduled interstate air carriers, was permitted to file a complaint in intervention.

The district court assumed jurisdiction over the case under 28 U.S.C. §§ 1331(a) and 1337, and trial of the action was held in September 1970. On November 30, the district court's findings of fact, conclusions of law and judgment were signed and filed. That judgment declared the Burbank ordinance unconstitutional, illegal and void, and enjoined its enforcement. The court held that the ordinance violated the Supremacy Clause, U.S. Const. art. VI, cl. 2, and the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. *Lockheed Air Terminal, Inc. v. Burbank*, 318 F. Supp. 914 (C.D. Cal. 1970).

This appeal was taken from that final judgment pursuant to 28 U.S.C. § 1291, and is properly before us. In deciding this case, we limit ourselves to the issue whether the municipal ordinance is unconstitutional under the Supremacy Clause, as that determination is dispositive of the appeal.

The Supremacy Clause states that the Constitution, federal laws "made in Pursuance thereof . . ." and treaties "made under the Authority of the United States, shall be the supreme Law of the Land. . . ." U.S. Const. art. VI, cl. 2. It establishes as a principle of our federalism that state and local laws are not enforceable if they impinge upon an exclusive federal domain. This impermissible impingement is diversely described as "preemption" and "conflict." The applica-

one of those terms means that the state or local government has attempted to exercise power which it does not possess because of an express or implied denial of that authority in the Constitution, valid federal laws and regulations promulgated thereunder, or valid treaties. See *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971). Compare *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), with *Perez v. Campbell*, 402 U.S. 607 (1971).

The Preemption Issue

In this case appellees (and FAA in its amicus curiae brief) contend that the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*, operates to deny Burbank the power to enact the ordinance in question. There is no doubt that the Act creates a comprehensive federal scheme to deal with air commerce, under the administrative auspices of the FAA and CAB. Section 1308 declares that the United States possesses and exercises complete and exclusive national sovereignty in the navigable airspace over the country, and section 1304 grants to the citizens of the United States a public right of freedom of transit in this navigable airspace. The CAB issues Certificates of Public Convenience and Necessity to air carriers, without which they cannot engage in air transportation, 49 U.S.C. § 1371, and the FAA Administrator has power to prescribe air traffic rules and develop plans and policy for the use of the navigable airspace, 49 U.S.C. § 1348. He also issues airman, aircraft, air carrier and airport operating certificates. 49 U.S.C. §§ 1422-24, 1432. Under section 1353, the Administrator of the FAA is directed to make "long range plans . . . and formulate policy . . ."

for the use of the navigable airspace and the development of air navigation facilities, including airports. If an airport is built or materially altered, the Administrator must be notified, even though no federal funds are involved, 49 U.S.C. § 1350.⁴ Section 1431, which was added to the Federal Aviation Act in July 1968, specifically provides for responsibility of the FAA Administrator with respect to ecological and environmental problems:

"(a) In order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, the Administrator of the Federal Aviation Administration . . . shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom.

Appellants (and the State of California as *amicus curiae*) argue that they are not precluded by the Federal Aviation Act from enacting the ordinance in question as an exercise of their police power, based on the legislative history of 49 U.S.C. § 1431, and the principle of State and local responsibility enunciated in the Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371 *et seq.*

Whether a federal statute preempts the otherwise lawful authority of a State or local government to

"In order to insure conformity to plans and policies for, and allocations of airspace by the Administrator under section 1348 of this title, no airport or landing area not involving expenditure of Federal funds shall be established, or constructed, or any runway layout substantially altered unless reasonable prior notice thereof is given the Administrator, pursuant to regulations prescribed by him, so that he may advise as to the effects of such construction on the use of airspace by aircraft."

regulate in a specific area is a question of Congressional intent. "[W]e start with the assumption that the police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Therefore, if Congress expressly declares that the authority conferred by it shall be singularly federal, the States may not exercise concomitant or supplementary power over the identical activity. *Campbell v. Hussey*, 368 U.S. 271 (1961); *Rice v. Santa Fe Elevator Corp.*, *supra*. Even when Congress has failed to speak expressly to the issue of federal exclusivity, intention to create sole federal authority can be implied. Key factors in this determination include: (1) the pervasiveness of the federal regulation, *Rice v. Santa Fe Elevator Corp.*, *supra*; (2) dominance of the federal interest in the field of regulation, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143-44 (1963); *Rice v. Santa Fe Elevator Corp.*, *supra*; and (3) the objectives of the federal regulation and whether non-federal regulation obstructs the full execution of those aims, *Perez v. Campbell*, 402 U.S. 637, 649 (1971); *Rice v. Santa Fe Elevator Corp.*, *supra*.

The pervasiveness of federal regulation in the field of air commerce, the intensity of the national interest in this regulation, and the nature of air commerce itself require the conclusion that State and local regulation in that area has been preempted.

The overall design of Congress in enacting the Federal Aviation Act of 1958 was to centralize in a single authority the power to establish rules and regulations for the sole and efficient use of the nation's airspace. *Int'l Line Pilots Ass'n, Inc'l v. Quesada*, 276 F.2d 892.

894 (2d Cir. 1960). This purpose is reflected in 49 U.S.C. § 1303, which lists those matters to be considered by the Administrator of the FAA in the exercise of his powers and the performance of his duties under the Act:

"(a) The regulation of air commerce in such a manner as to best promote its development and safety and fulfill the requirements of national defense;

"(b) The promotion, encouragement, and development of civil aeronautics;

"(c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both;

"(d) The consolidation of research and development with respect to air navigation facilities, as well as the installation and operation thereof;

"(e) The development and operation of a common system of air traffic control and navigation for both military and civil aircraft."

Those interests were supplemented in 1968 by the addition of 49 U.S.C. § 1431, which provides:

"(a) [T]he Administrator of the Federal Aviation Administration . . . shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise.

"(b) In prescribing and amending standards, rules and regulations under this section, the Administrator shall—

"(3) consider whether any proposed standard, rule or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest. . . ."

Pursuant to this statutory scheme, the Administrator of the FAA must balance considerations of safety, efficiency, technological progress, common defense and environmental protection in the process of formulating rules and regulations with respect to the use of the nation's airspace. There is no single objective to which he must address himself, but a complex of goals which may individually lobby for inconsistent results in a given circumstance. Congress has vested the federal agency with the responsibility and concomitant authority to resolve the proper balance among the multiple purposes. If State and local governments were to be allowed to exercise supplementary power in this area, they might conceivably be overprotective of one of the multiple values and upset the delicate balance struck by the FAA under the aegis of federal law.

The case of *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), vigorously cited by appellants in support of their position, is distinguishable on the basis of this analysis. There, Detroit was allowed to apply its Smoke Abatement Code to a vessel which had federally inspected and approved boilers. The Court found that the purpose of the federal inspection laws was "clearly limited to affording protection from the perils of maritime navigation." *Id.* at 445. On the other hand, the purpose of the city regulation was the control of air pollution for the health and welfare of its inhabitants. *Id.* at 442. Since these purposes were not conflicting and there was no overlap of scope between them, there was no preemption. The federal regulation was solely concerned with safety and not environmental quality,

and there was no argument that boilers which complied with the Detroit code might be less safe and, therefore, compromise the federal objective.*

Appellants argue that the legislative history of 49 U.S.C. § 1431 manifests Congress' intention to allow Burbank to regulate as it has. Our attention is directed to that portion of Senate Report No. 1353, 90th Cong., 2d Sess. 6-7 (1968), which quotes with approval from a letter of June 22, 1968, from the Secretary of Transportation to the Committee on Interstate and Foreign Commerce:

"The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines v. Town of Hempstead*, 272 F. Supp. 226 (U.S.D.C., E.D., N.Y., 1966). The court said, at 231, 'The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source.' H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.

"However, the proposed legislation will not affect the rights of a State or local public agency,

**Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), is likewise distinguishable on this basis.

as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

"Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. . . . [T]he Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. . . . The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations."

Appellants urge that, according to this Senate Report, 49 U.S.C. § 1431 was intended to apply only to aircraft "in flight," because *Hempstead* was an "in-flight" case.⁹ We do not believe this argument rests upon

⁹*American Airlines, Inc. v. Hempstead*, 272 F. Supp. 226 (S.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969); *Allegheny Airlines, Inc. v. Cedarhurst*, 238 F.2d 812 (2d Cir. 1956); and *American Airlines Inc. v. Audubon Park*, 297 F. Supp. 207 (W.D. Ky. 1968), *aff'd per curiam*, 407 F.2d 1306 (6th Cir.), *cert. denied*, 396 U.S. 845 (1969), involved ordinances enacted by cities and towns near major airports. The airports were not within the respective municipalities' boundaries. The ordinances limited the level of noise which could lawfully be created or the altitudes which could lawfully be assumed by overflying aircraft. FAA regulations with respect to landings and take-offs at the nearby airports required lower elevations and louder sounds than those permissible under the ordinances. The ordinances were, therefore, invalid because to obey them one would have to directly disobey the federal regulations.

a sound reading of either the Secretary's letter or the statute.

Pursuant to 49 U.S.C. § 1431, the Administrator of the FAA, after consultation with the Secretary of Transportation, is to prescribe and amend such rules and regulations as he may find necessary to provide for the abatement of aircraft noise. Surely this does not mean abatement of noise of aircraft flying at or above 35,000 feet. That is not the kind of noise from which the public needs "present and future relief and protection. . . ." The statute gives the Administrator power to deal with noise that is offensive to persons on the ground, including the noise created by low-flying aircraft, takeoffs and landings, and the noise created by aircraft on the ground at airports.*

The Secretary's letter emphasizes the status of the one regulating the use of the airport, not the locus of the aircraft when the offensive sounds are produced. A

*The Federal Airport Act of 1946, 49 U.S.C. § 1101 *et seq.*, further emphasizes the interdependence between aircraft and airport. It directs the development of a national plan for:

"[A] system of public airports adequate to anticipate and meet the needs of civil aeronautics. . . . In formulating and revising such plan, the Administrator shall take into account the needs of both air commerce and private flying . . . technological developments . . . [and] probable growth and requirements of civil aeronautics. . . ." 49 U.S.C. 1102.

The 1968 National Airport Plan prepared by the FAA in accordance with that directive notes:

"Thus, we see in the many forms of air travel—air carrier, general aviation, air cargo—a dominant element of the transportation industry in the U.S. The speed and efficiency of movement of goods and people obtained through air transportation are vital to our Nation's continued economic growth. Its advantages must be maintained. It is particularly important that the airport, as a principal component in the air transportation network, meets the demands placed on it by this growth." *Id.* at 4.

State or local public agency, as the proprietor of an airport, can deny the use of its airport based on noise consideration;³ a State or local government cannot use its police power to do so.⁴

The City of Burbank has no proprietorship interest in H-B Airport. It is making an effort to exert its police power in the field of noise regulation, which the Secretary states, and the Committee agrees, has been preempted by the Federal Government. The Supremacy Clause, U.S. Const. art. VI, cl. 2, invalidates that effort.

Prior to the argument of this case, the court invited the State of California to submit an amicus curiae brief and to participate in oral argument directed particularly to the effect of the Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371 *et seq.*, on the issues of this litigation. We have had the advantage of the State's comprehensive brief and its oral comments.

Section 4371(b)(2) of the Environmental Quality Improvement Act places the "primary responsibility for implementing . . ." the national policy for enhancement of environmental quality on "the State and local govern-

³As the Secretary's letter indicates, this reservation of power to the proprietors of airports to regulate their use derives from *Griggs v. Allegheny County*, 369 U.S. 84 (1962). That case held that Allegheny County, as promoter, owner and lessor of the Greater Pittsburgh Airport, was responsible to pay compensation for easements taken by the operation of the airport.

Pursuant to this proprietorship power, the City of Santa Monica has successfully imposed a curfew, similar to that envisioned by the City of Burbank, on the Santa Monica Airport. *Stagg v. Municipal Court*, 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (1969); see *In re Dreflur*, FAA Regulatory Docket No. 9071 (7/10/69).

⁴See *Opinion of the Justices*, ___ Mass. ___, 271 N.E.2d 354 (1971). But cf. *Blumov v. Morristown*, 108 N.J. Super. 461, 261 A.2d 692 (1969).

ments." This general commitment of environmental problems to local regulation does not, however, overcome the preemptive nature of Congress, particular commitment of air commerce problems to the federal domain. See *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971).

The State also points out that the Federal Aviation Act contains a "saving clause," 49 U.S.C. § 1506," a reservation of common law and statutory remedies, indicating that Congress did not intend to preempt state and local regulatory authority.

"Of course such a general provision does not resolve specific problems, *Arrow Transportation Co. v. Southern R. Co.*, 372 U.S. 658, 671, n. 22, but its inclusion in the statute plainly is inconsistent with congressional displacement of the state statute unless a finding of that meaning is unavoidable." *Head v. Board of Examiners*, 374 U.S. 424, 444 (1963) (concurring opinion).

In this case, we have found the conclusion of federal preemption "unavoidable." Furthermore, the Federal Aviation Act also contains language of exclusivity. 49 U.S.C. § 1508 declares that the United States possesses and exercises "complete and exclusive national sovereignty in the airspace of the United States. . . ." That is the same type of expression which the Supreme Court found in the Federal Tobacco Inspection Act to evidence Congressional intent to establish a wholly federal system which States were powerless even to supplement. *Campbell v. Hussey*, 368 U.S. 297 (1961).

¹⁰ § 1506. Remedies not exclusive

"Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

The Conflict Issue

The most recent pronouncement by the Supreme Court in the Supremacy Clause area came in *Perez v. Campbell*, 402 U.S. 637 (1971). There, the Court held that Arizona's Motor Vehicle Safety Responsibility Act conflicted with Section 17 of the Federal Bankruptcy Act, 11 U.S.C. § 35, which states that a discharge in bankruptcy discharges all but certain specified judgments. The state statute called for the suspension of the license of a driver who was involved in an automobile accident and who failed to post sufficient security with respect to potential liability. This suspension was to continue until any judgment debt incurred as a result of the accident was paid and proof of financial responsibility was given. The act expressly stated that release from the judgment debt through federal bankruptcy proceedings would not terminate the license suspension. In determining that there was conflict, the Court stated:

"As early as *Gibbons v. Ogden*, 9 Wheat. 1 (1824), Chief Justice Marshall stated the governing principle—that 'acts of the State legislatures . . . [which] *interfere with*, or are contrary to the laws of Congress, made in pursuance of the constitution,' are invalid under the Supremacy Clause. *Id.* at 211 (emphasis added). Three decades ago Mr. Justice Black, after reviewing the precedents, wrote in a similar vein that, while '[t]his Court in considering the validity of state laws in the light of treaties or federal laws touching the same subject, ha[d] made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interfer-

ence[.] . . . [i]n the final analysis, our function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)." 402 U.S. at 649 (emphasis added).

The Burbank ordinance in question "'stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* The FAA Chief of the Airport Traffic Control Tower at H-B Airport had already issued and put into effect a runway preference order, BUR 7100.5B,¹¹ dealing precisely with the problem of noise in the vicinity of the airport, at the time the Burbank curfew ordinance was passed. No question is raised as to the authority of the Chief of the Tower to issue this order, nor is there doubt as to its official character.

The order stated that "[p]rocedures established for the Hollywood-Burbank airport are designed to reduce community exposure to noise to the *lowest practicable minimum* . . ." (emphasis added). This assertion represents a considered determination by an authorized representative of the FAA that measures of the magnitude of that taken by the City of Burbank are beneath "the lowest practicable minimum." The municipal curfew ordinance, therefore, interferes with the balance set by the FAA among the interests with which it is empowered to deal, and frustrates the full accomplishment of the

¹¹See note 2 *supra*.

goals of Congress.¹² Because of this conflict, as well as the general preemption of the area of aircraft noise regulation from the exercise of a State or local government's police power, the Burbank ordinance is unconstitutional, illegal and void.

Judge Browning concurs in the judgment and in the portion of the opinion headed "The Conflict Issue."

The judgment of the district court is affirmed.

¹²At the date of the imposition of the curfew PSA operated a flight which departed H-B Airport at 11:30 each Sunday night for San Diego. An average of about 80 persons boarded at H-B Airport. The effect of the curfew was to terminate the right of flight of prospective passengers through this portion of the airspace of this time.

(TITLE OMITTED IN PRINTING)

APPEAL from the United States District Court for
the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed. With costs in this Court in favor of the Appellees and against the Appellants in the amount of \$1,500.00.

Filed and entered March 22, 1972.

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1637

CITY OF BURBANK, *et al.*,

Appellants,

vs.

LACKHEED AIR TERMINAL, INC., *et al.*,

Appellees.

Appeal From the United States Court of Appeals
for the Ninth Circuit.

APPENDIX.
VOLUME II.
(Pages 429-520.)

Jurisdictional Statement Filed June 17, 1972.
Probable Jurisdiction Noted October 16, 1972.

IN THE
Supreme Court of the United States

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No. 71-1637

CITY OF BURLINGAME, et al.,
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vs.

LOCKHEED AIR TERMINAL, INC., et al.,
Appellees.

Appeal from the United States Court of Appeals
for the Ninth Circuit.

APPENDIX
VOLUME II
(Pages 423-520.)



FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

**PLAINTIFFS AND INTERVENING PLAINTIFFS
EXHIBIT 4.**

Order Approving Acquisition.

Orders

Serial Number 745

The United States of America, Civil Aeronautics Board, Washington, D.C.

At a session of the Civil Aeronautics Board held at its office in the City of Washington, D.C., on the 22nd day of November, 1940.

In the Matter of the Application of United Air Lines Transport Corporation Lockheed Aircraft Corporation. Under section 408(b) of the Civil Aeronautics Act of 1938 for approval of the acquisition by Lockheed Aircraft Corporation from United Air Lines Transport Corporation of the outstanding capital stock of United Airports Company of California, Ltd. Docket No. 507.

United Air Lines Transport Corporation and Lockheed Aircraft Corporation having filed a joint application under section 408(b) of the Civil Aeronautics Act of 1938, as amended, for approval of the acquisition by Lockheed Aircraft Corporation from United Air Lines Transport Corporation of all of the outstanding capital stock of United Airports Company of California, Ltd., and a public hearing having been held; the Board, upon consideration of the record in the proceeding, having issued its opinion containing its findings of facts, conclusions, and decision, which is attached hereto and made a part hereof; and finding that its action in this matter is necessary pursuant to said opinion;

IT IS ORDERED, That said acquisition be, and the same is, approved.

By the Board:

/s/ **Thomas G. Early**

Thomas G. Early

Secretary

(Seal)

At a session of the Civil Aeronautics Board held at its office in the City of Washington, D.C., on the 21st day of November, 1946.

In the Matter of the Application of United Air Lines Transport Corporation (Lockheed Aircraft Corporation) under section 408(b) of the Civil Aeronautics Act of 1938 for approval of the acquisition by Lockheed Aircraft Corporation from United Air Lines Transport Corporation of the outstanding capital stock of United Airport Company of California, Inc.

United Air Lines Transport Corporation and Lockheed Aircraft Corporation having filed a joint application under section 408(b) of the Civil Aeronautics Act of 1938 as amended for approval of the acquisition by Lockheed Aircraft Corporation from United Air Lines Transport Corporation of all of the outstanding capital stock of United Airport Company of California, Inc., and a public hearing having been held thereon upon consideration of the record in the proceeding, having issued its opinion containing its findings of fact, conclusions, and decision, which is hereby approved and made a part hereof, and finding that it is within the public interest to approve said acquisition;

Opinion.

Civil Aeronautics Board

Lockheed Aircraft Corporation et al.* Acquisition of United Airports Company. Docket No. 507.

In the matter of the joint application of United Air Lines Transport Corporation and Lockheed Aircraft Corporation under section 408(b) of the Civil Aeronautics Act of 1938, as amended, for approval of the acquisition by Lockheed Aircraft Corporation from United Air Lines Transport Corporation of the outstanding capital stock of United Airports Company of California, Ltd.

Decided November 22, 1940.

Found that the acquisition by Lockheed Aircraft Corporation of all of the outstanding capital stock of United Airports Company of California, Ltd., from United Air Lines Transport Corporation will not be inconsistent with the public interest. Application for approval granted.

Appearances: *Paul M. Godehn* for United Air Lines Transport Corporation and Lockheed Aircraft Corporation; *Edward M. Weld* for Civil Aeronautics Board.

BY THE BOARD:

By a joint application filed under section 408(b) of the Civil Aeronautics Act of 1938, as amended, United Air Lines Transport Corporation, hereinafter called United, and Lockheed Aircraft Corporation, hereinafter referred to as Lockheed, seek approval of the acquisition by Lockheed from United for the sum of \$1,500,000, of all of the outstanding capital stock of United Airports Company of California, Ltd., hereinafter called Airports.

*Joint application of Lockheed Aircraft Corporation and United Air Lines Transport Corporation.

After due notice to the public and all interested parties in accordance with the provisions of the Act, a public hearing was held before Examiner J. Francis Reilly on November 19, 1940. At the conclusion of the hearing the examiner, with the consent of counsel, announced that he would recommend to the Board the granting of the application, and that no examiner's report would be issued.

United is the holder of certificates of public convenience and necessity authorizing it to engage in air transportation of persons, property, and mail between New York, N.Y., and Newark, N.J., and Oakland, Calif., via intermediate points,¹ known as route No. 1; between Seattle, Wash., and San Diego, Calif., via intermediate points, known as route No. 11; between Salt Lake City, Utah, and Seattle, Wash., and between Salt Lake City, Utah, and Spokane, Wash., via intermediate points, known as route No. 12; and between Denver, Colo., and Cheyenne, Wyo., known as route No. 17. In addition, the applicant holds a certificate authorizing air transportation of persons and property only between Seattle, Wash., and Vancouver, British Columbia, Can.²

Lockheed, a California corporation, is a manufacturer of commercial and military airplanes, and is now

¹Authorized to transport persons and property only to and from intermediate point, Philadelphia, Pa.

²*United Air Lines Transport Corporation, "grandfather" proceeding, C.A.A. Docket No. 16-401(E)-1, decided May 22, 1939, supplemental order August 1, 1939. American Airlines, Inc., et al., New York-Newark Amendment, C.A.A. Docket No. 278, et al., decided November 7, 1939; United Air Lines Transport Corporation, Philadelphia-Camden Amendment, C.A.A. Docket No. 419, decided June 14, 1940; United Air Lines Transport Corporation, Red Bluff Operation, C.A.A. Docket No. 261, et al., decided June 28, 1940.*

engaged in the production of a substantial number of military planes for the United States Government.

Airports is a Delaware corporation with an authorized capital stock of 25,000 shares of the par value of \$100 each, of which 13,840 shares, and no more, are now issued and outstanding, all of such shares being now owned and held by United. Airports is the owner of, and is engaged in the operation of, the Union Air Terminal, hereinafter called Terminal, located at Burbank, California, which airport is presently used by United, American Airlines, Inc., Transcontinental & Western Air, Inc., and Western Air Express Corporation, for their Los Angeles air transport operations. In addition, it leases facilities, office space and land at the Terminal to persons engaged in various aviation activities.

Section 408(a)(2) of the Act makes it unlawful, unless approved by the Board:

"For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;"

The total assets of Airports, amounting to \$1,301,157.68, represent about 7 per cent, or a substantial part, of the total assets of United and its various subsidiary companies of \$17,293,872.03.

Section 408(b) of the Act, under which the application in this case is filed, provides as follows:

"Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to

the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control *will not be consistent with the public interest* or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: Provided, That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control * * * *

Lockheed plans to use the facilities at the Terminal as a flight base in connection with the manufacture, servicing, delivery, and testing of military and commercial airplanes. Its subsidiary, Vega Airplane Company, which will also utilize those facilities, now has under construction a large plant adjacent to this airport for the manufacture of military aircraft. Lockheed desires to immediately build additional hangar facilities at the Terminal to expedite its production of military planes. Unquestionably, consummation of the proposed acquisition would be in the interest of the national defense.

Lockheed will cause Airports to continue to furnish United, American Airlines, Inc., Transcontinental & Western Air, Inc., and Western Air Express Corporation, the air carriers presently using the Terminal, the kind and quality of service and facilities that Airports is now furnishing to said carriers, until the transfer of their transport operations to Los Angeles Municipal Airport, which is now under construction.

After these air carriers have transferred their transport operations to Los Angeles Municipal Airport, Lockheed will cause Airports, for such reasonable charges and upon such reasonable terms and conditions as may be agreed upon, to provide such air terminal service and facilities as these carriers may reasonably require on occasions when transport operations at Los Angeles Municipal Airport become impractical by reason of weather or other compelling conditions.

If, after operations are inaugurated at the Los Angeles Municipal Airport, any one or more of the above-named carriers should desire to also use the Terminal for the operation of regular schedules, then and in that event, Lockheed shall cause Airports to negotiate with such carrier or carriers, and endeavor to agree upon a lease or leases providing for the use of the Terminal and its facilities in connection with the operation of such regular schedules; *provided, however, that Lockheed shall not be required to cause Airports to enter into any such lease or leases which would substantially interfere with existing or contemplated operations at the Terminal by Lockheed or by its subsidiaries or affiliates.* The record clearly indicates that the above-named air carriers are cognizant of, and have no objection to, the proposed acquisition. The record also shows that the consummation of the proposed transac-

tion will cause no interruptions to, interference with, or in any respect have any adverse effect upon, the air-transport services provided the public in the Los Angeles area. On the contrary, the availability of an alternate or provisional airport will be of general benefit to air transport operations in this territory.

The record shows that, in the event of the Board's approval of the proposed acquisition, the parties have agreed that United shall forthwith notify Lockheed, in writing, of such approval, and shall, in such notice, fix a date (hereinafter sometimes called the "closing date") not later than twenty days after the delivery of such notice for the payment by Lockheed of the purchase price of Airports' stock and the delivery of Airports' stock to Lockheed. The record further shows that the parties have agreed that at 11:00 o'clock a.m., Pacific Standard Time, on the closing date, United shall deliver to Lockheed at Union Air Terminal, Burbank, California:

(a) Certificates evidencing the Airports' stock, duly endorsed in blank, for transfer, having affixed thereto federal stock transfer tax stamps covering the applicable federal stock transfer tax; and

(b) Resignations of all members of the Board of Directors of, and of all elective officers of Airports, upon payment to United by Lockheed of the purchase price of Airports' stock, in the sum of One Million Five Hundred Thousand Dollars (\$1,500,000). If said closing date shall be prior to June 1, 1941, said payment shall be made by certified or cashier's check in Chicago Clearing House funds in the sum of Fifty Thousand Dollars (\$50,000) and by a promissory note of Lockheed payable to United on or before June

1941, in the principal sum of One Million Four Hundred Fifty Thousand Dollars (\$1,450,000), collaterally secured by said stock. If, however, said closing date shall be on or subsequent to June 1, 1941, the full purchase price in the sum of One Million Five Hundred Thousand Dollars (\$1,500,000) shall be paid by certified or cashier's checks, payable to the order of United in Chicago Clearing House funds.

United acquired all of the outstanding capital stock of Airports on August 31, 1934. At that time the fixed assets of Airports were carried on the books of that corporation at \$1,179,993.27, which represented the original cost of those assets less a write-down of \$398,350.67, which was made on December 31, 1932. Additions to the property accounts since August 31, 1934, have been made at original cost in the total amount of \$123,486.31, and retirements of property have been removed from property accounts at cost in the total amount of \$53,462.07, resulting in a net increase in the property account of \$70,024.24 since August 31, 1934. The present fixed assets of Airports amount to \$1,250,017.51, and the total assets \$1,301,357.68.

Since its acquisition by United in 1934, Airports has realized the following net profit from its operations:

Sept. 1, 1934 to Dec. 31, 1934 . . .	\$ 2,118.64*
Jan. 1, 1935 to Dec. 31, 1935 . . .	433.58*
Jan. 1, 1936 to Dec. 31, 1936 . . .	1,484.55
Jan. 1, 1937 to Dec. 31, 1937 . . .	10,246.21
Jan. 1, 1938 to Dec. 31, 1938 . . .	8,584.11
Jan. 1, 1939 to Dec. 31, 1939 . . .	12,993.90
Jan. 1, 1940 to Aug. 31, 1940 . . .	<u>32,053.45</u>
Total . . .	\$62,810.00

*Loss

There is no evidence in the record which would lead us to conclude that the price to be paid by Lockheed for the outstanding capital stock of Airports is inadequate or otherwise inconsistent with the public interest.

Accordingly, on the basis of the foregoing findings of fact and a full consideration of all of the evidence in the record, we find that the acquisition of all of the outstanding capital stock of United Airports Company of California, Ltd., by Lockheed Aircraft Corporation from United Air Lines Transport Corporation would not be inconsistent with the public interest. The record is clear that the proposed acquisition would not result in creating a monopoly or monopolies, and thereby restrain competition or jeopardize another air carrier not a party to the transaction. The joint application filed in this proceeding is, therefore, approved.

An appropriate order will be entered.

Branch, Chairman, Ryan and Baker, Members of the Board, concurred in the above opinion. Warner and Mason, Members, did not take part in the decision.

Notice of Hearing.

Civil Aeronautics Authority, Civil Aeronautics Board, Washington, D. C.

In the matter of the Application of United Air Lines Transport Corporation Lockheed Aircraft Corporation, under section 408(b) of the Civil Aeronautics Act of 1938 for approval of the acquisition by Lockheed Aircraft Corporation from United Air Lines Transport Corporation of the outstanding capital stock of United Airports Company of California, Ltd., Docket No. 507.

The above-entitled proceeding is hereby assigned for public hearing on November 19, 1940, 10 o'clock a.m. (Eastern Standard Time) at the Carlton Hotel, 923 16th Street, N.W., Washington, D. C., before Examiner J. Francis Reilly.

Dated Washington, D. C., November 13, 1940.

By the Civil Aeronautics Board:

/s/ Thomas G. Early
Thomas G. Early
Secretary

(Seal)

**PLAINTIFFS AND INTERVENING PLAINTIFFS
EXHIBIT 5.**

Department of Commerce, Civil Aeronautics Administration, Washington 25, D. C.

- ☒ Approach Light Lane Site High Intensity
- ☒ Instrument Landing System Sites
- ☒ Radar Sites

Location Lockheed Air Terminal, Burbank, California.

LICENSE

1. For and in consideration of One Dollar (\$1.00) for period 1/1/51 to 6/30/51 per annum and in view of the benefit to the Lockheed Air Terminal Airport and to the general public utilizing same, the undersigned, hereinafter referred to as the licensor, hereby grants to the United States of America the license, right and privilege to install, operate and maintain an approach light lane; an instrument landing system; radar facilities; and necessary control facilities, upon the following described lands in the County of Los Angeles in the State of California more particularly described as follows:

See Exhibit "A" attached.

Note: Items 2 and 5 of Exhibit "A" have been deleted, inasmuch as these two sites are located on U. S. Government property. License application for these two sites should be requested from the U. S. Engineers.

2. Together with the right of ingress and egress over the said lands and adjoining lands of the licensor, necessary or convenient for the installation, operation and maintenance of the approach light lane; an instrument landing system; radar facilities; and necessary con-

and facilities; and a right-of-way for a power line and control line, overhead and underground, or other facilities, over and across the said lands and adjoining lands of the licensor, said right of ingress and egress and said right-of-way, unless hereinbefore described by metes and bounds, to be by the most convenient routes; and the right to utilize any existing power lines, control lines, conduits, or other facilities of the licensor which are adaptable to use in connection with the purpose of this license.

3. The right of ingress and egress and the right-of-way herein granted shall inure to the benefits of the licensee and its duly authorized agents, representatives, contractors and employees.

4. The licensor further agrees not to erect or to allow to be erected on the property licensed hereby or on adjacent property of the licensor, any structure or obstruction of whatsoever kind or nature as will interfere with the proper operation of the facilities to be installed by the Government under the terms of this license unless consent thereto shall first be secured from the licensee in writing.

5. This license shall become effective January 1, 1951 and shall remain in force until June 30, 1951 and may, at the option of the Government be renewed from year to year, at a rental of One Dollar (\$1.00) per annum and otherwise upon the terms and conditions specified, provided notice be given in writing to the licensor at least thirty days before this license or any renewal thereof would otherwise expire: Provided Further, That no renewal thereof shall extend the period of occupancy of the premises beyond the 30th day of June 1971.

6. This license may be cancelled by either party upon six months notice in writing, or at any date which may be mutually agreed upon.

7. All structures, improvements, or other property placed upon the said premises by the United States shall remain its property and may be removed by it upon the expiration or termination of this license or within 90 days thereafter.

8. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this license or to any benefit to arise therefrom. Nothing, however, herein contained shall be construed to extend to any incorporated company, if the license be for the general benefit of such corporation or company.

9. **NON-DISCRIMINATION:** The licensor shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The licensor shall include a similar provision in any subcontract he may enter into in connection with the performance of this license. (Executive Order 9346 dated May 27, 1943).

Dated this 26th day of April, 1951.

LOCKHEED AIR TERMINAL, INC.

/s/ Cyril Chappellet

Licensor, President

Address:

2627 No. Hollywood Way

Burbank, California

ACCEPTED:

UNITED STATES OF AMERICA

By: /s/ "F. G. Jennings"

F. G. Jennings

Chief, Procurement Branch

Civil Aeronautics Administration

If licensor is a corporation, the following certificate shall be executed by the secretary or assistant secretary)

I, **L. W. WULFEKUHLE**, certify that I am the Secretary of the Corporation named as licensor in this license that **CYRIL CHAPPELLET**, who signed said license on behalf of the licensor, was then President of said corporation, that said license was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

/s/ Wulfekuhler (corporate)

EXHIBIT "A"

1. *Localizer Site:* A plot of ground extending 265 feet westerly from a point 940 feet westerly of the west end of Runway #7 and on the centerline produced of said runway and extending 210 feet south and 235 feet north of said extended centerline, containing 2-2/3 acres more or less.
2. *Glide Path Site:* A plot of ground 60 feet square two sides of which are parallel to Runway #7 the center of which is 400 feet north of the centerline of Runway #7 and 750 feet east of the west end of said runway, containing 0.03 acres more or less.
3. *Middle Compass Locator Site:* A plot of ground extending 65 feet westerly from a point 2600 feet westerly of the west end of Runway #7 and on the centerline produced of said runway and extending 15 feet south, or to said railroad right-of-way line and 210 feet north of said extended centerline containing 0.34 acres more or less.

4. **High Intensity Approach Light Lane:** A right-of-way for a high intensity ladder type approach light lane, substation and connecting cables over a strip of land 50 feet in width with centerline parallel to and 165 feet north of the centerline of Runway #7 extended west from the west end of Runway #7 approximately 2930 feet to the east right-of-way line of Tujunga Avenue and excluding the said right-of-way of Vineland Avenue. The regulator substation shall consist of a plot of ground approximately 50 feet square, two sides of which are parallel to Runway #7 the center of which is 210 feet north of the centerline of Runway #7 and approximately 450 feet west of the west end of said runway, containing 0.06 acres more or less.

5. **Airport Surveillance Site:** A plot of ground 65 feet square, two sides on which are parallel to Runway #7 the center of which is approximately 1150 feet north of centerline Runway #7 and 1800 feet east of the west end of said runway, containing 0.17 acres more or less. The site shall be located adjacent to the airport boundary fence, along Sherman Way and at a location mutually agreed upon by officials of Lockheed and Civil Aeronautics Administration.

6. **Lighting System:** A plot of ground 65 feet square, two sides on which are parallel to Runway #7 the center of which is approximately 1150 feet north of centerline Runway #7 and 1800 feet east of the west end of said runway, containing 0.17 acres more or less. The site shall be located adjacent to the airport boundary fence, along Sherman Way and at a location mutually agreed upon by officials of Lockheed and Civil Aeronautics Administration.

**PLAINTIFFS AND INTERVENING PLAINTIFFS
EXHIBIT 6.**

C6en-3975

Lockheed Air Terminal

Burbank, California

Localizer Site, Middle

Compass Locator Site,

and High Intensity

Approach Light Lane

SUPPLEMENTAL AGREEMENT #1

This Supplemental Agreement entered into this 27th day of May, 1952, by and between the UNITED STATES OF AMERICA, hereinafter called the Government, represented by the contracting officer executing this Agreement, and

LOCKHEED AIR TERMINAL, INC.

2627 NORTH HOLLYWOOD WAY

BURBANK, CALIFORNIA

WHEREAS, on the 26th day of April, 1951, the parties hereto entered into a lease covering the installation of an Instrument Landing System Localizer, Middle Compass Locator and a High Intensity Approach Light Lane on the Lockheed Air Terminal, Burbank, California and

NOW THEREFORE, inasmuch as the Government desires to install a High Intensity Approach Light Lane 165 feet north of the center line of Runway #7 to take advantage of the full width of the runway, Paragraph No. 4 of Exhibit "A" of Contract C6en-3975 dated April 26, 1951, shall be modified, effective May 1, 1952, in the following particulars, but in no other:

Paragraph 4, Exhibit "A",

Delete from line 4 of Paragraph No. 4, Exhibit "A" 125 feet and insert in line 4 of Paragraph 4 of Exhibit "A", 165 feet.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first written.

LOCKHEED AIR TERMINAL, INC.

/s/ L. W. Wulfekuhler

Secretary

LWF

JM

UNITED STATES GOVERNMENT

/s/ P. O. Jennings

P. O. Jennings

Chief, Procurement Branch

Civil Aeronautics Administration

C4ca-2127-A

Lockheed Air Terminal

Burbank, California

Localizer Site, Middle

Compass Locator Site,

and High Intensity

Approach Light Lane

SUPPLEMENTAL AGREEMENT #2

This Supplemental Agreement entered into this 24th day of July, 1957, by and between the UNITED STATES OF AMERICA, hereinafter called the Government, represented by the contracting officer executing this Agreement, and

LOCKHEED AIR TERMINAL, INC.

2627 NORTH HOLLYWOOD WAY

BURBANK, CALIFORNIA

WHEREAS, on the 26th day of April, 1951, the parties hereto entered into a License for the installation, operation, and maintenance of an Instrument Landing System Localizer, Middle Compass Locator and a High Intensity Approach Light Lane on certain lands in the County of Los Angeles, State of California, and designated as Contract No. C6en-3975.

WHEREAS, on the 27th day of May, 1952, the parties hereto entered into Supplemental Agreement No. 1, whereby Paragraph 4, Exhibit "A" of said License was amended in certain respects, and

WHEREAS, by letter dated July 20, 1953, the Government redesignated said License effective July 1, 1953, to be known as Contract No. C4en-2127-A.

WHEREAS, the Government desires to install a Configuration "A" Approach Light System along the centerline of Runway 7 extended west approximately 2930 feet. Portions of such Approach Light System shall be on land which Lockheed Air Terminal, Inc. is licensed the use by the United States of America under Contract No. W-3460-Eng-747, dated June 15, 1944, as amended. Other portions of such Approach Light System shall be on land owned in fee by the United States of America, jurisdiction over these portions being vested in Sacramento Air Material Area.

NOW THEREFORE, subject to the rights granted Lockheed Air Terminal, Inc. by the United States of America, and limited to the extent Lockheed Air Terminal, Inc. is licensed to extend these rights to others, the parties hereto agree to further modify said License, effective June 1, 1957, as follows:

1. Exhibit "A" of said License shall be deleted in its entirety, and the following shall be substituted in lieu thereof:

EXHIBIT "A"

1. *Localizer Site:* A plot of ground extending 265 feet westerly from a point 940 feet westerly of the west end of Runway #7, and on the centerline produced of said runway and extending 210 feet south and 235 feet north of said extended centerline, containing 2-2/3 acres more or less.
2. *Middle Compass Locator Site:* A plot of ground extending 65 feet westerly from a point 2600 feet westerly of the west end of Runway #7 and on the centerline produced of said runway and extending 15 feet south, or to said railroad right-of-way line and 210 feet north of said extended centerline containing 0.34 acres more or less.
3. *Configuration "A" Approach Light System:* A right-of-way for a Configuration "A" Approach Light System as shown on CAA Drawings No. 4-D-5577-IX and 4-D-5577-2X, over a strip of land 330 feet wide, 165 feet being on both sides of the centerline of Runway #7, extended westerly from the west end of Runway #7 approximately 2930 feet to the east right-of-way line of Tujunga Avenue, the northerly right-of-way of the Southern Pacific Railroad Company and excluding the right-of-way of Vineland Avenue. The Regulator Substation shall consist of a plot of ground approximately 50 feet square, two sides of which are parallel to Runway

#7, the center of which is 210 feet north of the extended centerline of Runway #7 and approximately 450 feet westerly of the west end of Runway #7.

2. Except as herein modified and amended, the terms of said License shall remain in full force and effect during the term thereof.

IN WITNESS WHEREOF, the parties hereto have executed this Supplemental Agreement No. 2 as of the day and year first written.

LOCKHEED AIR TERMINAL INC.

Original Signed by

L. W. Wulfekuhler

UNITED STATES GOVERNMENT

/s/ **E. R. Main**

E. R. Main, Chief

Lease and Utilities Section

Civil Aeronautics Administration

I, **D. M. SIMMONS**, certify that I am the Secretary of Lockheed Air Terminal, Inc., the corporation named in the attached Supplemental Agreement #2; that **L. W. Wulfekuhler**, who signed said Supplemental Agreement #2 on behalf of Lockheed Air Terminal, Inc., was then President of said corporation; that said Supplemental Agreement #2 was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

Original signed by

D. M. Simmons

FEDERAL AVIATION AGENCY
Region Four Headquarters
5651 West Manchester Boulevard
Los Angeles 45, California
January 4, 1960

Lockheed Air Terminal, Inc.
2627 North Hollywood Way
Burbank, California

Attention: Administrative Assistant—Finance
Gentlemen:

SUBJECT: Amendment of lease, license and/or permit to include automatic renewal clause.

Contract No. C4ca-2127-A

Location: Lockheed Air Terminal
Burbank, California

Facility Localizer, Middle Marker, Compass Locator,
High Intensity Approach Light Lane - ILS

The above contract is modified effective February 1, 1960 by deleting Article 5 and adding the automatic renewal clause as follows:

Article 5:

"This lease may, at the option of the Government, be renewed from year to year at a rental of \$1.00 p.a., and otherwise upon the terms and conditions herein specified. The Government's option shall be deemed exercised and the lease renewed each year for one year unless the Government vacates the premises, or gives 30 days notice that it will not exercise its option, before this lease or any renewal thereof expires; Provided, That no renewal thereof shall extend the period of occupancy of the premises beyond the 30th day of June 1971: And Provided further, That adequate ap-

appropriations are available from year to year for the payment of rentals."

All other terms and conditions of the contract to remain the same.

If you sell your property, or if you change your mailing address from that shown on this amendment, please advise this office immediately.

In witness whereof, the parties hereto have executed this amendment as of January 26, 1960.

THE UNITED STATES OF AMERICA

/s/ By: E. R. Main

E. R. Main, Chief

Real Estate & Public Utilities Section

I hereby agree to the amendment set forth above:
Lockheed Air Terminal, Inc.

/s/ By: ILLEGIBLE

TITLE:

**U. S. Government Equipment
Used in the Control of Aircraft
At Hollywood-Burbank Airport**

- 1) Air Traffic Control Tower Equipment
(Receivers, transmitters, recorders, wind direction and velocity indicators, land line communication equipment, etc.)
(Located in Bldg. 10)
- 2) Terminal Radar Approach Control (TRACO)
(Located in Bldg. 10)
- 3) Bright Radar Indicator Terminal (BRITE-1)
(Located in Bldg. 10 Tower Cab)

- 4) **Flight Data Entry and Print Out Equipment (EDEP)** (Located in Bldg. 10 TRACON room Tower Cab)
- 5) **Very High Frequency (VHF) Direction Finder (DF)** (Located in Bldg. 10 TRACON room)
- 6) **Runway Visual Visibility (RVV)** (Located in Bldg. 10 and Glide Slope area east of Vineland)
- 7) **Airport Surveillance Radar (ASR-5)** (Located north of the PAC area)
- 8) **Instrument Landing System (ILS)**
Outer Marker and Compass Locator (Located on Van Nuys Airport)
Middle Marker and Compass Locator (Located approximately 1-1/2 miles and 1/2 mile respectively from end of runway)
Localizer (Located west of Vineland)
Glide Slope (Located east of Vineland)
- 9) **Approach Light System**
with sequential flashers (strobe lights)
(Located west of Vineland Avenue)
- 10) **Runway End Identifier Lights (REIL)**
(Located approach end of runway 15)
- 11) **Remote Transmitter Site (RT)**
(Located at Plant C-1—old radar antenna site)
- 12) **Ceillometer, Dew Point and Temperature Equipment**
(Located east of Tujunga and Bldg. 10 area)

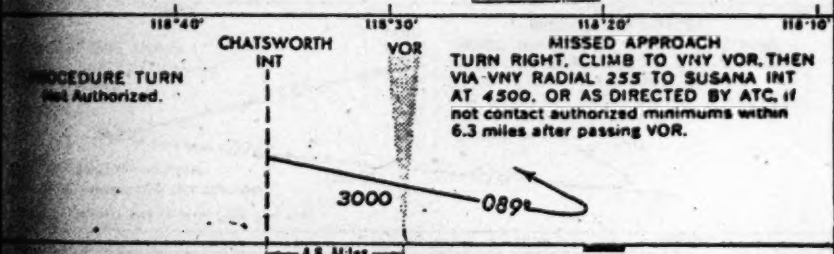
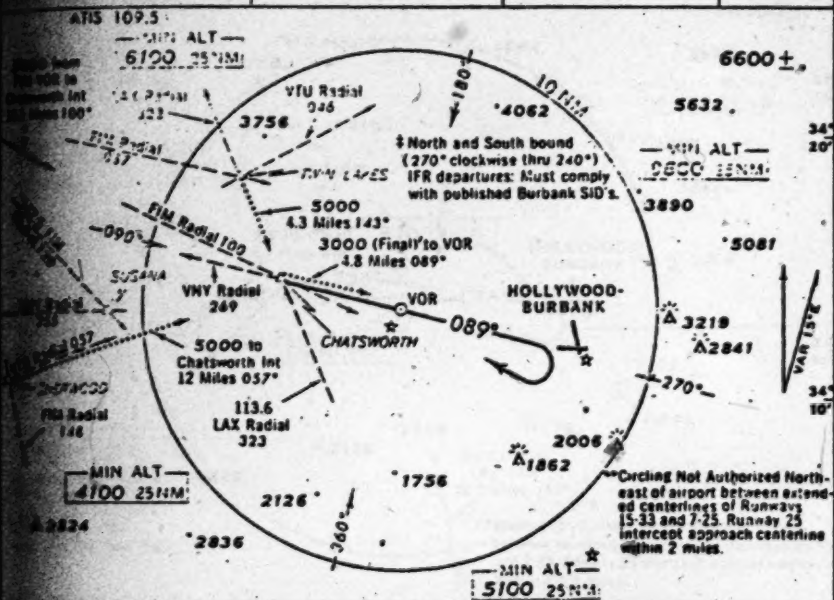
ARCH PRO (FAA)

HOLLYWOOD-BURBANK AIRPORT

U.S. COAST AND GEODETIC SURVEY

BURBANK, CALIF.

APPROACH CONTROL 120.4 350.6	VAN NUYS RADIO 113.1 VNY	BURBANK TOWER 118.7 254.3 GROUND CONTROL 121.9 348.6	RADAR AVAILABLE
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MINIMA			FIELD ELEV 775	
60 knots or less 2 eng or less	Over 60 knots 2 eng or less	Over 60 knots Over 2 eng	DAY	DAY
500-1	500-1	500-1	500-1	500-1
500-2	500-2	500-2	500-2	500-2
500-3	500-3	500-3	500-3	500-3
500-4	500-4	500-4	500-4	500-4
500-5	500-5	500-5	500-5	500-5
500-6	500-6	500-6	500-6	500-6
500-7	500-7	500-7	500-7	500-7
500-8	500-8	500-8	500-8	500-8
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500-11	500-11	500-11	500-11	500-11
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500-98	500-98	500-98	500-98	500-98
500-99	500-99	500-99	500-99	500-99
500-100	500-100	500-100	500-100	500-100

**RADAR
AVAILABLE**

6600+.

FIELD ELEV 775

772A

780

785

Control Tower 779

From LOW to High

26	90	180	110	170
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1.48	1.25	1.07	2.23	2.00
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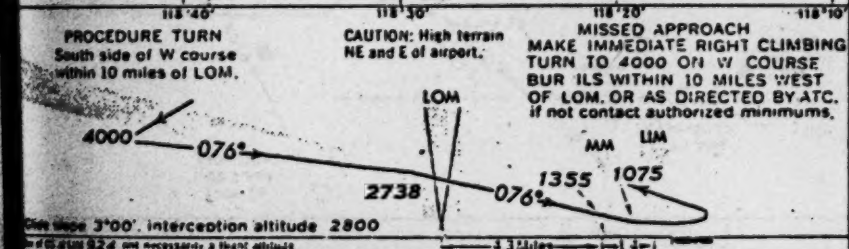
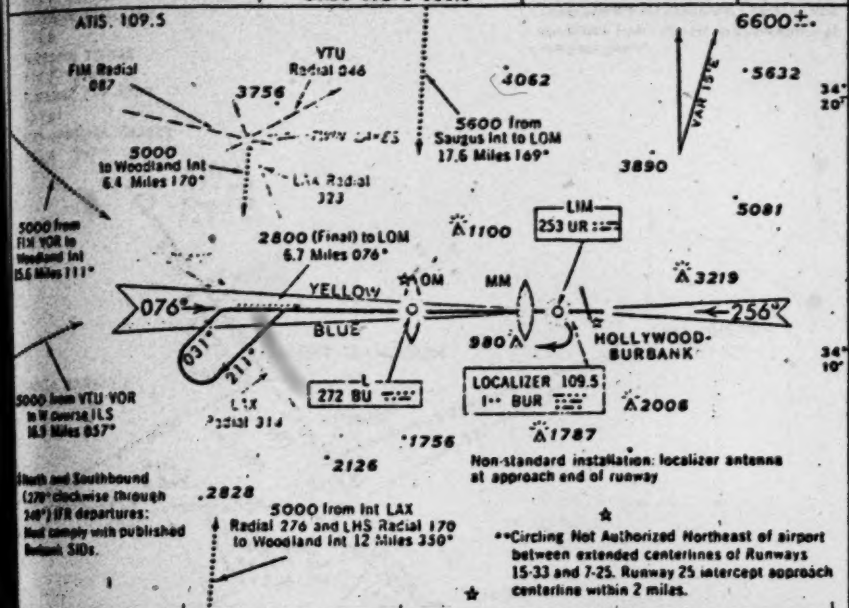
34°12'N - 118°21'W

BURBANK, CALIF

HOLLYWOOD-BURBANK AIRPORT

MAY 1965

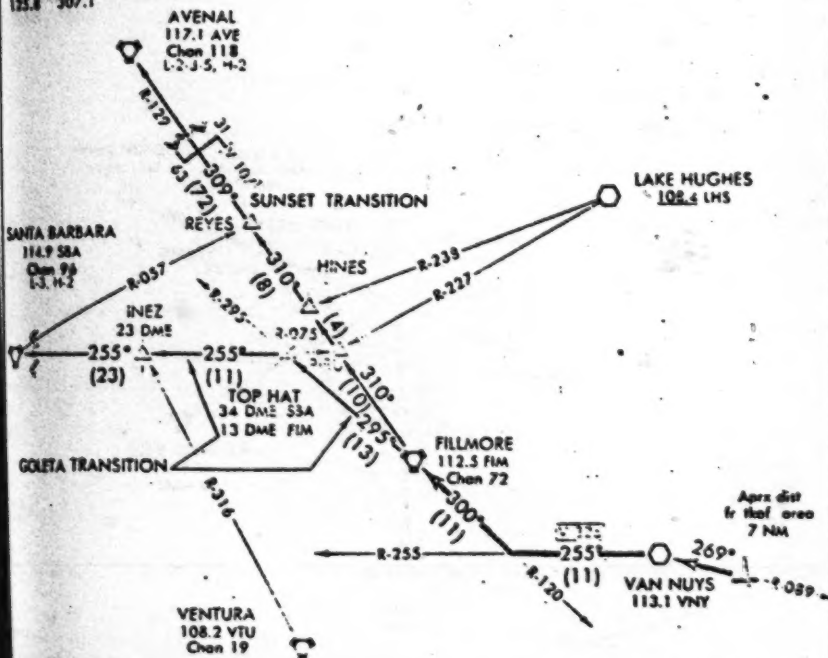
BURBANK APPROACH CONTROL	LOCALIZER 109.5	BURBANK TOWER	RADAR
120.4 360.6	1 -- BUR	118.7 254.3	AVAILABLE
	GLIDE SLOPE 332.6	GROUND CONTROL 121.9 348.6	



MINIMA				FIELD ELEV 775	
65 knots or less 2 eng or less	Over 65 knots 2 eng or less	Over 65 knots 2 eng or less	Over 65 knots 2 eng or less	Over 65 knots 2 eng or less	Over 65 knots 2 eng or less
DAY	DAY	DAY	DAY	DAY	DAY
1	2	3	4	5	6
7	8	9	10	11	12
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289	290	291	292	293	294
295	296	297	298	299	300

BURBANK GND CON
121.9 348.6
BURBANK CLNC DEL
118.0
BURBANK TOWER
118.7 254.3
BURBANK DEP CON
124.6
LOS ANGELES CENTER
123.8 307.1

NOTE: IFR departures from Rwy 7 not authorized unless aircraft able to conduct flight in VFR conditions from take-off to interception of assigned course.

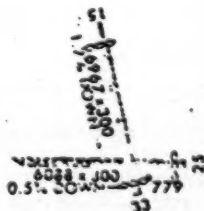


Take-off Runway 15, 25: Turn right. Thence
Take-off Runway 33: Turn left. Thence
via VAN NUYS 089 radial to VAN NUYS,
thence via VAN NUYS 255 and FILLMORE 120
radials to FILLMORE. Thence via (transition) or
(assigned route).

GOLETA TRANSITION: Via FILLMORE 295 and
SANTA BARBARA 075 radials to SANTA
BARBARA.

SUNSET TRANSITION: Via FILLMORE 310 and AVENAL 129 radials to AVENAL.

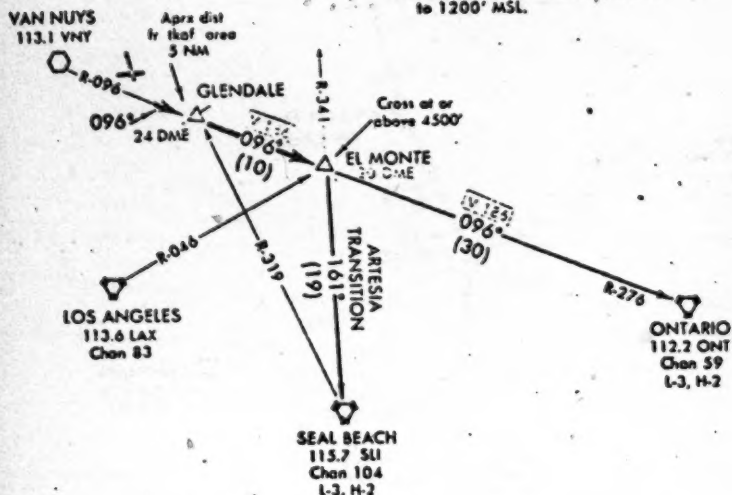
ELEV 775



EL MONTE SEVEN DEPARTURE

BURBANK GND CON
121.9 348.6
BURBANK CLNC DEL
118.0
BURBANK TOWER
118.7 354.3
BURBANK DEP CON
124.6
LOS ANGELES CENTER
125.3 307.1

NOTE: 1. Rwy 7 take-off Not Authorized with this procedure.
2. This SID requires a minimum climb rate as specified below:
Take-offs Rwy 15, 347' per NM to 2000' MSL.
Take-offs Rwy 25, 283' per NM to 2000' MSL.
Take-offs Rwy 33, 480' per NM to 1200' MSL.



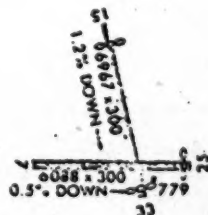
DEPARTURE ROUTE DESCRIPTION

Take-off Runway 15, 25, 33: Turn left. Thence via VAN NUYS 096 radial to EL MONTE INTXN. Thence via (transition). Cross EL MONTE INTXN at (minimum 4500').

ONTARIO TRANSITION: Via ONTARIO 276 radial to ONTARIO.

ARTESIA TRANSITION: Via SEAL BEACH 341 radial to SEAL BEACH.

ELEV 775



EL MONTE SEVEN DEPARTURE

BURBANK, CALIFORNIA
HOLLYWOOD - BURBANK

TWIN LAKES TWO DEPARTURE

HOLLYWOOD—BURBANK
SUSANNE CALVERT

MURBANK GND CON
121.9 348.6
MURBANK CLNC DEL
118.0
MURBANK TOWER
118.7 354.3
MURBANK DEP CON
124.6
LOS ANGELES CENTER
123.8 307.1

BAKERSFIELD
115.4 BFL
Chan 101

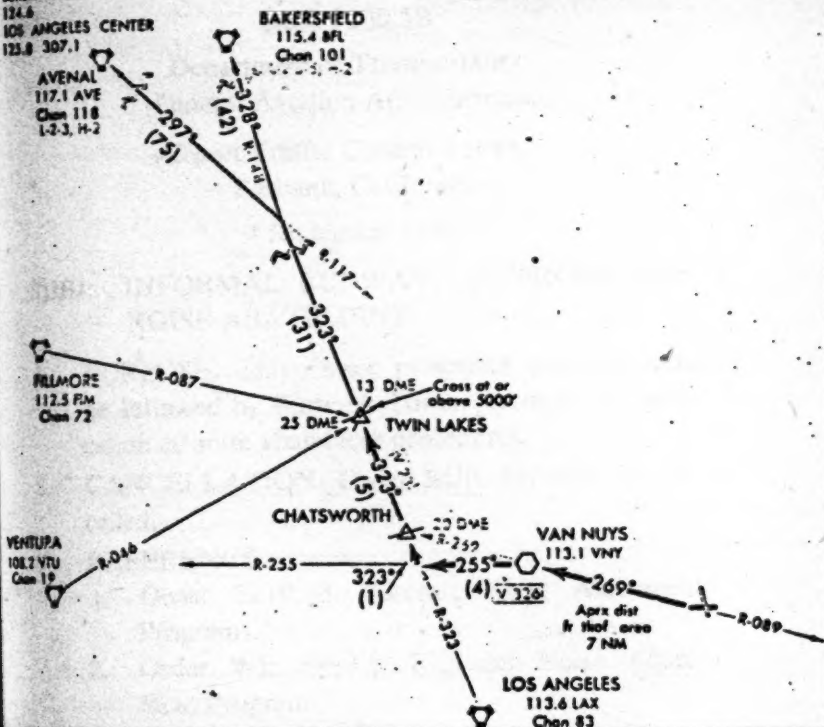
AVENAL
117.1 AVE
Chas 118
1-2-3, H-2

FILMORE
112.5 PM
Ques 72

VENTURA
108.2 VTU
Chan 19

S ANGELES
113.6 LAX
Chen 83

NOTE: This SID requires a minimum climb rate of 200' per NM. IFR departures from Rwy 7 not authorized unless aircraft able to conduct flight in VFR conditions from take-off to interception of assigned course.



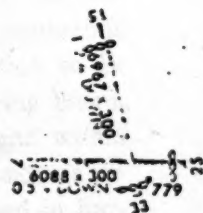
DEPARTURE ROUTE DESCRIPTION

Take-off Runway 15, 25: Turn right. Thence
Take-off Runway 33: Turn left. Thence
via VAN NUYS 089 radial to VAN NUYS, thence
via VAN NUYS 255 and LOS ANGELES 323 ra-
dials to TWIN LAKES INTXN. Thence via (transi-
tion) or (assigned route). Cross TWIN LAKES
INTXN at (minimum 5000').

BAKERSFIELD TRANSITION: Via LOS ANGELES
323 and BAKERSFIELD 148 radials to
BAKERSFIELD.

AVENAL TRANSITION: Via LOS ANGELES 323
and AVENAL 117 radials to AVENAL.

ELEV 775



WIN LAKES TWO DEPARTURE

HOLLYWOOD—BURBANK

**PLAINTIFFS' AND INTERVENING PLAINTIFFS
EXHIBIT 30.**

ORDER

BUR 7100.5B

**Department of Transportation
Federal Aviation Administration**

**Airport Traffic Control Tower
Burbank, California**

4 September 1969

**SUBJ: INFORMAL RUNWAY USE PROGRAM—
NOISE ABATEMENT**

1. **PURPOSE.** This Order prescribes procedures to be followed by Burbank Tower personnel in application of noise abatement procedures.
2. **CANCELLATION.** Order BUR 7100.5A is cancelled.
3. **REFERENCE.**
 1. Order 7110.13, Aircraft Noise Abatement Programs.
 2. Order WE 7490.1, Regional Noise Abatement Program.
 3. FAR 91.87(d), Minimum Altitudes.
4. **BACKGROUND.** The problem of noise in the vicinity of the Hollywood-Burbank Airport has become increasingly serious. More noise complaints are being received. Threats of legal action to be taken to obtain relief from noise are being heard. We need to do everything practicable and within reason to reduce the noise exposure to residents living near the airport. The workload caused in handling and following-up on noise complaints has in-

creased to the point where it occupies a major portion of the administrative workload of the facility. Procedures established for the Hollywood-Burbank airport are designed to reduce the community exposure to noise to the lowest practicable minimum. The procedures are not mandatory on the part of the pilots, however, traffic controllers must be noise abatement conscious and emphasize noise abatement in order to obtain the highest degree of voluntary cooperation from pilots. The area within a 5-mile radius of the Hollywood-Burbank Airport is considered to be a noise-sensitive area.

5. PROCEDURES. The following procedures apply to large (over 12,500 pounds) aircraft and all turbine powered aircraft:

a. Normally, do not assign runway 7 for departures, or runway 25 for arrivals.

b. Traffic and weather permitting, make every effort to use runway 7 for 11-5 arrivals of turbine powered aircraft. Needless to say, authorizing the landing of a turbine powered aircraft on runway 7 while landing light aircraft on runway 15 should be handled with extreme caution. The occasional issuance of a "go-around" to a light aircraft landing on runway 15 under these circumstances would not be considered an "abnormal operation". (This will also remove jet aircraft from the light aircraft traffic pattern and reduce instances of jet aircraft allegedly encroaching on the Whiteman Airpark traffic pattern.)

- c. Traffic and weather permitting, use runway 25 for departures of turbine powered aircraft as much as possible during period from approximately 2300 to 0700 local time when people are asleep (residential area is less dense and further from end of runway west of 25 than south of 15).
- d. When issuing wind information, give both wind direction and velocity. Do not describe wind as calm unless the velocity is zero.
- e. In the event a pilot requests departure on runway 7 or landing on runway 25, honor the request, traffic permitting, but inform the pilot that the runway is "noise sensitive". (Residential area closest east of airport.)
- f. These procedures are not intended to incur delays to aircraft or hamper the controller in handling airport traffic. If the traffic situation existing at the time requires the use of runways contrary to these procedures, controllers may deviate from the procedures. *Controllers are expected to use good judgment in making this determination.*
- g. Report to the office any particular aircraft or company which consistently declines to cooperate with the noise abatement program.

/s/ R. N. Lemmer

R. N. Lemmer

Chief, Burbank Tower

ORDER

BUR 7100.5A

**Federal Aviation Agency
Airport Traffic Control Tower
Burbank, California**

**SUBJ: INFORMAL RUNWAY USE PROGRAM—
NOISE ABATEMENT**

1. **PURPOSE.** This Order prescribes procedures to be followed by Burbank Tower personnel in application of noise abatement procedures.
2. **CANCELLATION.** Order BUR 7100.5 is cancelled.
3. **REFERENCE.** Order 7110.13, Aircraft Noise Abatement Programs.
4. **BACKGROUND.** The problem of noise in the vicinity of airports is becoming increasingly serious. More noise complaints are being received, more legal action is being taken to obtain relief from noise, and if the situation does not improve, it may be that runways or even entire airports will be closed because of noise. The workload caused by processing and follow-up on noise complaints has increased to the point where it seriously hampers administrative personnel in the performance of other important duties. Procedures have been established for the Hollywood-Burbank airport which should reduce the incidence of noise complaints. The procedures are not mandatory on the part of the pilots, however, traffic controllers must emphasize noise abatement in order to obtain the highest degree of voluntary cooperation by pilots.

5. **PROCEDURES.** The following procedures apply to large (over 12,500 pounds) aircraft and all turbine powered aircraft:

- a. The area within a 5-mile radius of the Hollywood-Burbank Airport is considered to be a noise-sensitive area.
- b. Normally, do not assign runway 7 for departures, or runway 25 for arrivals.
- c. During periods of little or no traffic use runway 7 for arrivals of turbine powered aircraft.
- d. When issuing wind information, give both wind direction and velocity. Do not describe wind as calm unless the velocity is zero.
- e. In the event a pilot requests departure on runway 7 or landing on runway 25, honor the request, traffic permitting, but inform the pilot that the runway is "noise sensitive".
- f. These procedures are not intended to hamper the controller in handling airport traffic. If the existing traffic situation requires the use of runways contrary to these procedures, controllers may deviate from the procedures. Controllers are expected to use good judgment in making this determination.
- g. Report to the office any particular aircraft or company which consistently declines to cooperate with the noise abatement program.

/s/ R. N. Lemmer

R. N. Lemmer

Chief, Burbank Tower

ORDER

BUR 7100.5

Federal Aviation Agency

Airport Traffic Control Tower

Burbank, California

April 23, 1968

**SUBJ: INFORMAL RUNWAY USE PROGRAM—
NOISE ABATEMENT**

1. **PURPOSE.** This Order prescribes procedures to be followed by Burbank Tower personnel in application of noise abatement procedures.
2. **CANCELLATION.** Order BUR 7100.3 is cancelled.
3. **REFERENCE.** Order 7110.13, Aircraft Noise Abatement Programs.
4. **BACKGROUND.** The problem of noise in the vicinity of airports is becoming increasingly serious. More noise complaints are being received, more legal action is being taken to obtain relief from noise, and if the situation does not improve, it may be that runways or even entire airports will be closed because of noise. The workload caused by processing and follow-up on noise complaints has increased to the point where it seriously hampers administrative personnel in the performance of other important duties. Procedures have been established for the Hollywood-Burbank airport which should reduce the incidence of noise complaints. The procedures are not mandatory on the part of pilots, however, traffic controllers must emphasize noise abatement in order to obtain the highest degree of voluntary cooperation by pilots.

5. **PROCEDURES.** The following procedures apply to large (over 12,500 pounds) aircraft and all turbine powered aircraft:

- a. The area within a 5-mile radius of the Hollywood-Burbank Airport is considered to be a noise-sensitive area.
- b. Normally, do not assign runway 7 for departures, or runway 25 for arrivals.
- c. When issuing wind information, give both wind direction and velocity. Do not describe wind as calm unless the velocity is zero.
- d. In the event a pilot requests departure on runway 7 or landing on runway 25, honor the request, traffic permitting, but inform the pilot that the runway is "noise sensitive".
- e. These procedures are not intended to hamper the controller in handling airport traffic. If the existing traffic situation requires the use of runways contrary to these procedures, controllers may deviate from the procedures. Controllers are expected to use good judgment in making this determination.
- f. Report to the office any particular aircraft or company which consistently declines to cooperate with the noise abatement program.

/s/ R. N. Lemmer

R. N. Lemmer

Chief, Burbank Tower

ORDER

BUR 7100.3

Federal Aviation Agency

Airport Traffic Control Tower

Burbank, California

SUBJ: USE OF NOISE ABATEMENT RUNWAYS

1. **PURPOSE.** This Order prescribes procedures which shall be followed by Burbank Tower personnel in order to encourage use of noise-abatement runways.
2. **BACKGROUND.** The problem of noise in the vicinity of airports is becoming increasingly serious. More noise complaints are being received, and more legal action is being taken to obtain relief from noise. Air traffic control procedures have been restricted in the interest of noise abatement, and, if the situation does not improve, it may be that runways or even entire airports will be closed because of noise. The workload caused by processing and follow-up on noise complaints has increased to the point where it seriously hampers administrative personnel in the performance of other important duties. Procedures have been established for the Hollywood-Burbank airport which, if followed, should reduce the incidence of noise complaints. These procedures have, for the most part, been ignored by both pilots and traffic controllers. The procedures are not mandatory on the part of pilots, however, traffic controllers must emphasize noise abatement in order to obtain the higher degree of voluntary cooperation by pilots.

3. PROCEDURES.

- a. The following order of runway preference has been established:
 - (1) Takeoff day and night: Runway 15, Runway 25, Runway 33, Runway 7.
 - (2) Landing day and night: Runway 15, Runway 7, Runway 33, Runway 25.
- b. These procedures are applicable only when:
 - (1) Runways are clear and dry.
 - (2) The wind velocity does not exceed fifteen (15) knots.
 - (3) The crosswind component does not exceed 80° from either side of the centerline of the runway in the direction of use.

4. ACTION

- a. When conditions described above permit application of noise abatement procedures, controllers shall assign a noise abatement runway to all large aircraft (12,500 lbs. and over) and to all turbojet aircraft, in accordance with the following guidelines.
- b. If a pilot requests takeoff on runway 7, or landing on runway 25, inform him, "Runway (number of runway in use) is a noise abatement runway".
- c. If the pilot then repeats his request, approve or disapprove the request solely on the basis of traffic.
- d. These procedures are not intended to hamper the controller in handling airport traffic. If the existing traffic situation requires the use

of a runway other than a noise-abatement runway, controllers may deviate from these procedures. Controllers are expected to use good judgment in making this determination.

- e. Report to the office any particular aircraft or company which consistently refuses to cooperate in the use of noise-abatement runways.

/s/ R. N. Lemmer

R. N. Lemmer

Chief, Burbank Tower

PLAINTIFFS' AND INTERVENING PLAINTIFFS EXHIBIT 32.

FACILITY MANAGEMENT

October 1, 1969.

**Federal Aviation Administration
Air Traffic Service**

**Facility Management
72103**

Foreword

1. PURPOSE.

This handbook comprised of four Parts, governs operation and administration of the operating facilities of the Air Traffic Control System. It provides instruction, standards and guidance for facility supervisory personnel. Part I contains information of a basic nature that is applicable to all facilities. Part II applies to Air Route Traffic Control Centers; Part III to Terminal Traffic Control facilities; and Part IV to Flight Service Stations.

2. EFFECTIVE DATE:

This handbook is effective 10/1/69.

3. CANCELLATION.

Facility Operation, 7230.1, is cancelled.

4. EXPLANATION OF MAJOR CHANGES.

a. Certain parts of 7230.1 have not been included in 7210.3 since they appear in other publications as follows:

(1) Air Traffic Training, 3120.4, Change 1—Part 250, paragraphs 262.1 through 265, paragraph 256.6, paragraphs 266 through 266.10, Appendix 1 to Part 200.

(2) Terminal Air Traffic Control, 7110.8 En Route Air Traffic Control, 7110.9 Flight Services, 7110.10, Change 3—Part 501, Part 504, Part 510, and Part 515.

(3) Order 7230.7, FAA Near Midair Collision Study—Part 347 (The provisions of this Order will be incorporated in a future revision to 7210.3.)

b. 393, 417, 419, 420, 421. Adds provisions for preparing Incident and Flight Asst. Reports.

/s/ William M. Flener

WILLIAM M. FLENER

Director, Air Traffic Service

Chapter 12. Flow Control

Section 1. General

1140. TYPES OF FLOW CONTROL

Flow control service consists of:

a. **Flow Control Advisory**—Notifies the user of actual or anticipated delays due to weather, equipment outages, and special military activity. Provides information which permits the user to plan and dispatch flights economically.

b. **Flow Control Restriction**—Regulates the number of aircraft that can be accepted within an area; restricts altitudes and/or routes to be flown during a specified period of time.

1141. ACTION BY AFFECTED CENTERS

A flow control restriction obligates the centers addressed to comply with the requirements of the message by:

a. Clearing the aircraft on specified routes.

b. Establishing the separation required in time or altitude or distance as specified in the message.

c. Limiting the number of departures in a given time period.

1142. JUDICIOUS USE OF FLOW CONTROL

Use flow control restrictions to regulate or restrict the flow of aircraft, within the affected area or at an altitude stratum, to the maximum number of aircraft which can be safely accommodated by the Air Traffic Control System.

1143. INITIATING FLOW CONTROL

Initiate flow control advisories/restrictions whenever the best interest of the ATC system and its users will be served thereby.

1144. COORDINATION WITH USERS

Facilities finding a need to initiate the same flow control restriction on a daily or continuing basis shall coordinate with the users for direct assistance in flight planning of appropriate routes/altitudes.

1145-1154. RESERVED

Section 2. Operations

1155. ISSUANCE OF FLOW CONTROL ADVISORIES

Initiate flow control advisories for the area when you anticipate that:

a. Arrival delays will exceed 30 minutes and the condition causing the delay (weather, equipment, etc.) is expected to prevail for an extended period of time. Update delay information as subsequent delays increase or decrease by 15 minute intervals.

b. Normal flow of traffic will be disrupted by equipment/NAVAID outages or other factors such as military ALTRV.

c. Departure delays will exceed 30 minutes.

1156. LIMITATIONS OF ADVISORIES

Limit flow control advisories to a period not to exceed 4 hours. Cancel or revise the advisory when the condition requiring its issuance is no longer applicable.

1157. ADDRESSING ADVISORIES

Address flow control advisories to centers and FS's concerned using Area "B" circuit coding.

Example: Washington Center addressing to associated FSS's and adjacent centers and FSS's: XXW XXA XXJ XXL XXR XXV

1158. ITEMS INCLUDED IN ADVISORIES

Include in Flow Control Advisories:

a. Identification of message as a FLOW CONTROL ADVISORY.

b. Anticipated delay in the Center's area.

c. Reason for the delay and other pertinent information.

d. Effective time when not immediate and void time of advisory.

1159. MESSAGE FORMAT

To issue flow control advisory of anticipated delay, use message format similar to the following:

Examples:

"FLOW CONTROL ADVISORY. IFR AIRCRAFT LANDING KENNEDY ANTICIPATE 45 MINUTES DELAY. TRAFFIC VOID 021100."

"FLOW CONTROL ADVISORY. IFR AIRCRAFT LANDING DENVER CAN ANTICIPATE 35 MINUTE DELY. RADAR SERVICE NOT AVAILABLE. EFC-TV 141800 VOID 142200."

1160. ISSUANCE OF FLOW CONTROL RESTRICTION

Initiate flow control restrictions for the area when the number of aircraft is expected to exceed the traffic handling capability of the facility.

1161-1169. RESERVED

1170. LIMITATIONS OF RESTRICTIONS

Limit flow control restrictions to a period not to exceed 4 hours.

a. To extend the provisions of a previously specified restriction, transmit a revised message at least 1 hour before the void time of the preceding message.

b. Cancel flow control restrictions as soon as practical.

1171. ADDRESSING RESTRICTIONS

Address flow control restriction to:

a. Adjacent Centers and FSS's concerned using Area "B" circuit coding.

b. Any center beyond the adjacent center where terminals are expected to generate a significant amount of traffic for the affected area during the effective time of the message.

1172. ITEMS INCLUDED IN RESTRICTIONS

Include the following in Flow Control restrictions:

a. Identification of message as a FLOW CONTROL RESTRICTION.

b. Restriction to route, altitude, and/or spacing as required.

c. Other pertinent information.

d. Effective time when not immediate and void time of the restriction.

1173. MESSAGE FORMAT

Use message format similar to the examples given below:

a. To increase spacing between aircraft being provided radar separation:

"FLOW CONTROL RESTRICTION. PROVIDE A MINIMUM OF 15 MILES SEPARATION BETWEEN TARGETS ON HANDOFF REGARDLESS OF ALTITUDE FOR AIRCRAFT LANDING KENNEDY VIA J60. VOID 210000."

b. To effect longitudinal separation:

(1) By spacing aircraft over fixes in equal units of time:

"FLOW CONTROL RESTRICTION. PROVIDE A MINIMUM OF 20 MINUTES SEPARATION BETWEEN AIRCRAFT REGARDLESS OF ALTITUDE FOR FLIGHTS EN ROUTE CLEVELAND ON V188. EFCTV 121000 VOID 121300."

(2) By spacing aircraft on a specific route and/or landing at a specific airport:

"FLOW CONTROL RESTRICTION. LIMIT AIRCRAFT VIA V116 LANDING O'HARE TO THREE PER HOUR. VOID 220100."

(3) By spacing aircraft at the same altitude along a route:

"FLOW CONTROL RESTRICTION. PROVIDE A MINIMUM OF 20 MINUTES SEPARATION BETWEEN AIRCRAFT AT THE SAME ALTITUDE ON V16. VOID 020100."

c. To effect vertical separation by separating arriving from en route aircraft:

"FLOW CONTROL RESTRICTION. ASSIGN TRAFFIC LANDING MIDWAY OR O'HARE 120 OR BELOW. ASSIGN EN ROUTE TRAFFIC 140 OR ABOVE. VOID 220100."

d. To effect lateral separation by requiring flight along a specific route:

(1) For preferential departure/arrival routings:

"FLOW CONTROL RESTRICTION. ROUTE V188 V90 TRAFFIC EN ROUTE WILLOW RUN VIA V116. VOID 220200."

(2) To relieve Center operating positions under saturation traffic or personnel shortage:

"FLOW CONTROL RESTRICTION. ROUTE AIRCRAFT ABOVE FL 240 PROCEEDING EAST OF CHICAGO TO ENTER AREA ON J64. VOID 221-900."

e. To restrict the adjacent Center to a specific number of aircraft per hour:

"FLOW CONTROL RESTRICTION. REQUEST 12 AIRCRAFT PER HOUR LANDING O'HARE REGARDLESS OF ROUTE OR ALTITUDE. VOID 220100."

1174. ACTION AND RESPONSIBILITY

Forward flow control messages as soon as possible after it is determined that flow control service is required. Because of computer flight planning, dispatch offices need as much advance notice as possible to comply with route/altitude changes.

1175. COORDINATION

Except when a flow control restriction message is forwarded 1 hour or more before its effective time, coordinate the restriction with appropriate Centers via Service F and follow up this action with a confirmation message via teletypewriter as soon as possible.

1176. ISSUING INSTRUCTIONS

Issue the following information to the appropriate FSS, dispatch office, or operations office using a means

of communication and message format previously established by the Center:

- a. All current flow control advisories and restrictions which have been initiated or received.
- b. Arrival delays exceeding 30 minutes at terminals within its area.
- c. EAC times of affected aircraft, when feasible.
- d. Departure delays in excess of 30 minutes in any direction at terminals within the area.

1177. PROVIDE FLOW CONTROL FROM INDEPENDENT POSITION OF OPERATION

Where traffic volume requires, provide flow control service from an independent position of operation. In those Centers having insufficient traffic to warrant establishment of such a position, the Watch Supervisor on duty shall make alternative arrangements for providing flow control service.

1178-1199. RESERVED

Chapter 19. Flow Control

Section 1. Notification Procedures

1850. ANTICIPATED DELAYS

Notify the ARTCC when you anticipate that departing aircraft will incur delays of more than 30 minutes.

1851. ADDITIONAL PERTINENT INFORMATION

Notify the ARTCC of any other information you consider pertinent which relates to flow control.

1852. AIRCRAFT UNDER TOWER EN ROUTE CONTROL JURISDICTION

Issue delay times, as necessary, to aircraft under your jurisdiction to achieve consistency with delays issued to aircraft under ARTCC jurisdiction en route to your terminal area.

1853. DELAYS OF MORE THAN 30 MINUTES

Inform the ARTCC when you anticipate that en route, arriving, or departing aircraft under your jurisdiction will incur delays of more than 30 minutes.

1854. FLOW CONTROL SERVICE

Provide aircraft operating under tower en route control with flow control service, as necessary.

1855-1899. RESERVED

**PLAINTIFFS AND INTERVENING PLAINTIFFS
EXHIBIT 33.**

ORDER

ATTACHMENT B

230.12

**Department of Transportation
Federal Aviation Administration**

4/27/70

SUBJ: CENTRAL FLOW CONTROL FACILITY

1. **PURPOSE.** This Order establishes the Central Flow Control Facility (CFCF) and sets forth its organization, responsibilities, and functions.
2. **CANCELLATION.** Notice 7230.117 is cancelled.
3. **BACKGROUND.** The practice by air route traffic control centers (ARTCCs) of restricting the flow of air traffic to comply with immediate individual circumstances results in random points of congestion elsewhere in the system causing unplanned delays. The overall system capacity is usually adequate, given proper load dispersal, to contain the traffic creating the congestion. The ARTCCs are not equipped or staffed to perform the long range coordination necessary to effect needed balance between the total demands on the ATC system and its capacity to ensure continuing maximum utilization of the airspace. No method is foreseeable for enlarging the scope of centers sufficiently to give them such systemwide capability.
4. **OBJECTIVE.** Establish a central facility to collect and correlate air traffic information and

pertinent meteorological data for the purpose of achieving greater utilization of the airspace and balancing the system demand against its capacity.

5. **ESTABLISHMENT.** To provide for the collection, correlation and application of the information to achieve 4 above, the Central Flow Control Facility (CFCF) is hereby established in building FOB 10A, as a permanent air traffic control facility in the National Airspace System. CFCF shall function under the Director, Air Traffic Service.

6. **RESPONSIBILITIES.**

a. **CFCF shall:**

- (1) Manage the flow of air traffic throughout the ATC system to minimize en route delays and achieve the maximum utilization of the airspace. This shall be accomplished through investigation of system congestion points with recommended improvements, rerouting from point of origin significant portions of the known traffic demand, coordinated redistribution of dynamic system loading or by post action review and recommended remedial action to prevent recurrence of undesirable or untenable situations.
- (2) Concur or indicate nonconcurrency in proposed flow control restrictions by ARTCC's unless mutually agreed alternative measures are coordinated with the affected center.
- (3) Monitor the application of flow control restrictions issued throughout the system for duration and effectiveness and sug-

best methods to prevent recurrence when appropriate.

(4) Issue flow control instructions, when necessary, to relieve congestion and to assure the orderly flow of traffic. Prior to issuance, proposed flow control restrictions will be coordinated with the concerned ARTCCs.

(5) Determine overall ATC system capacity on a continuing basis by relating the condition of the National Airspace System components and continental weather patterns which affect it.

(6) Serve as an ATS Operations Command Post during periods of significant disruptions to air traffic services when required by the Director, Air Traffic Service, and provide equipment and personnel support as appropriate.

(7) Work directly with centers and towers as appropriate.

b. ARTCCs shall:

(1) Have final authority over the control of traffic at all times including the decision to issue flow control restrictions.

(2) Coordinate proposed flow control restrictions affecting intercenter traffic with CFCF prior to issuance unless safety of traffic dictates immediate action. The coordination process will include:

(a) The reason for the restriction.

(b) Expected duration.

(c) Discussion of alternative restrictions, if appropriate.

(d) Securing concurrence or nonconcurrence from CFCF in the specific restriction.

(3) When issuing flow control restrictions, designate the CFCF as an addressee (CFC). Administrative traffic to CFCF should be routed to RWA.

(4) Work directly with CFCF as appropriate.

c. **AT-300** shall:

(1) Exercise direct control and authority over the operation of CFCF as directed by AT-1.

(2) Pay the travel and per diem costs for flow controllers assigned to CFCF on temporary assignments.

d. **Regions** shall provide for the continuing assignment of currently qualified experienced flow controllers for periods of six weeks as requested by CFCF.

7. **ACTION.** All services, offices, regions, and facilities shall support CFCF to the extent of their resources and provide the assistance necessary to achieve the full implementation and continuance of the CFCF program.

/s/ J. H. Shaffer

J. H. Shaffer

Administrator

**PLAINTIFFS' AND INTERVENING PLAINTIFFS
EXHIBIT 36.**

**Office of the Council
City of Burbank
California**

September 14, 1967

**Civil Aeronautics Board
1825 Connecticut Ave., N.W.
Washington 25, D.C.**

Re: Dockets Nos. 18884 and 18909

Gentlemen:

On behalf of the City Council of the City of Burbank, I am writing to urge that the Pacific Northwest-California Service Investigation (Docket No. 188-84) be reopened so that all carriers who wish to serve this area may be heard. Petitions for reconsideration of Board Order E-25504 and motions for consolidation which are intended to achieve this objective should be granted.

We are advised that Pacific Southwest Airlines, Inc. has filed such a petition and motion (Docket No. 18909) with your honorable body. It is not our policy to favor any one carrier over another, but we have had experience with this fine carrier and feel that it should be given the opportunity to present its case for service to the Pacific Northwest. What we are interested in is gaining service at Hollywood-Burbank Airport for the citizens of the City of Burbank and the more than two and one-half million residents of Los Angeles County who find Hollywood-Burbank Airport more conveniently accessible than the overcrowded fa-

cilities at the Los Angeles International Airport. We therefore urge that the applications of any carrier or carriers who are ready, willing and able to provide service at Hollywood-Burbank Airport to and from points in the Pacific Northwest and in particular, Portland, Oregon and Seattle, Washington, be heard and considered.

All too often carriers are granted authority to provide service in the Los Angeles area with Hollywood-Burbank Airport as a coterminal and then concentrate all of their service at the Los Angeles International Airport. We hope that you will take another look at the Pacific Northwest and that in your deliberations you will place a great deal of emphasis upon the willingness of a carrier to actually provide service at the Hollywood-Burbank Airport.

Respectfully,

/s/ Charles E. Compton

CHARLES E. COMPTON

Mayor, City of Burbank

PLAINTIFFS AND INTERVENING PLAINTIFFS
EXHIBIT 39.

RESOLUTION NO. 14,506

A RESOLUTION OF THE COUNCIL OF THE CITY OF BURBANK REQUESTING THE CIVIL AERONAUTICS BOARD TO AUTHORIZE CONVENIENT AND DIRECT AIR PASSENGER SERVICE BY PACIFIC AIRLINES FROM BURBANK TO SAN DIEGO, LAS VEGAS AND PORTLAND.

WHEREAS, Pacific Airlines, Inc. has applied to the United States Civil Aeronautics Board for the operating authority to provide non-stop air passenger service from Lockheed Air Terminal in Burbank to San Diego, California; to Las Vegas, Nevada; and to Portland, Oregon; and

WHEREAS, there is not currently any non-stop air passenger service from Burbank to Portland or from Burbank to Las Vegas; and the authority requested by Pacific Airlines would provide one stop air passenger service from San Diego to Las Vegas via Burbank, which would expedite air travel to fill the needs of the three cities; and

WHEREAS, Lockheed Air Terminal is readily accessible to all parts of Los Angeles and is the air transportation facility directly and primarily available to three million people in the northern half of the Los Angeles metropolitan area; and

WHEREAS, conversely, Los Angeles International Airport, with its related surface transportation and passenger handling facilities, is overtaxed, congested and inconvenient for the immediate requirements of the people in the northern metropolitan area; and

WHEREAS, it is the determination of this Council that the commencement of non-stop air passenger transportation service from Burbank to Portland and to Las Vegas, together with one stop air passenger service via Burbank from San Diego to Las Vegas, will help to meet the growing requirements of the industrial and population centers directly serviced by Lockheed Air Terminal;

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF BURBANK that the United States Civil Aeronautics Board be urged to consider favorably and grant in the public interest the air passenger operating authority requested by Pacific Airlines, Inc. in the matter docketed No. 18189.

BE IT FURTHER RESOLVED THAT THE City Clerk be directed to transmit a copy of this resolution to the Civil Aeronautics Board.

PASSED and ADOPTED this 18th day of April, 1967.

/s/ Robert F. Brandon

Robert F. Brandon, President of the
Council of the City of Burbank

Attest:

/s/ Marion W. Marshall

Marion W. Marshall, City Clerk

State of California, County of Los Angeles, City of
Burbank—ss.

I, MARION W. MARSHALL, City Clerk of the City of Burbank, do hereby certify that the foregoing resolution was duly and regularly passed and adopted by the Council of the City of Burbank at its regular

meeting held on the 18th day of April, 1967, by the following vote:

AYES: Councilmen Compton, Haven, Whitney and Brandon.

NOES: Councilmen None.

ABSENT: Councilman Williams.

/s/ Marion W. Marshall

Marion W. Marshall, City Clerk

The Within Instrument Is a Correct
Copy of the Original on File in this Office

Attest: Date: 4-19-67

/s/ Marion W. Marshall,

City Clerk of the City of Burbank

By

**PLAINTIFFS' AND INTERVENING PLAINTIFFS
EXHIBIT 40.**

RESOLUTION NO. 15,190

A RESOLUTION OF THE COUNCIL OF THE CITY OF BURBANK URGING THE CALIFORNIA PUBLIC UTILITIES COMMISSION TO APPROVE NON-STOP PASSENGER AIR-SERVICE BETWEEN THE HOLLYWOOD-BURBANK AIRPORT AND SACRAMENTO.

WHEREAS, there is pending before the California Public Utilities Commission an application or applications to provide through non-stop passenger air service between the Hollywood-Burbank Airport and Sacramento; and

WHEREAS, the vast area served by the Hollywood-Burbank Airport is greatly in need of such service; and

WHEREAS, there are numbers of persons living and working in and around the Hollywood-Burbank metropolitan area who currently desire non-stop passenger air service to and from Sacramento; and

WHEREAS, travelers from this area using the Los Angeles International Airport for travel to and from Sacramento are subject to a substantial time loss that would be significantly curtailed if service were available at the Hollywood-Burbank Airport; and

WHEREAS, such service would help relieve traffic congestion in and around the Los Angeles International Airport, both in the air and on the ground.

NOW, THEREFORE, the Council of the City of Burbank does resolve that the Public Utilities Commission of the State of California is urged to favorably consider authorizing non-stop passenger air service be-

tween the Hollywood-Burbank Airport and Sacramento at the earliest possible time.

RESOLVED FURTHER that the City Clerk shall send a certified copy of this resolution to the Public Utilities Commission of the State of California.

PASSED and ADOPTED this 13th day of May, 1969.

George W. Haven
Mayor of the City of Burbank

Attest:

Marion W. Marshall, City Clerk

**PLAINTIFFS' AND INTERVENING PLAINTIFFS
EXHIBIT 41.**

Office of the Council

City of Burbank

California

August 2, 1966

Honorable Charles S. Murphy

Chairman

Civil Aeronautics Board

Universal Building, No. 1010

Washington, D. C. 20428

Dear Mr. Murphy:

Recently, the Civil Aeronautics Board tentatively determined that it was in the public interest to liberalize the operating rights of Pacific Air Lines, Inc. by permitting the carrier to provide nonstop air passenger service to eleven growing, Western markets. Four of these involve and terminate in the City of Burbank. This City agrees with the Board's determination and urges Pacific Air Lines, Inc. to take advantage of the authority granted and in particular to initiate air carrier service between Burbank and the Cities of Oakland and Sacramento.

Lockheed Air Terminal, which is situate primarily within the City of Burbank, is the air transportation facility primarily available to three million people in the Northern half of the Los Angeles metropolitan area. It is readily accessible to all parts of Los Angeles. Its favorable location and the communities which it serves are depicted on the diagram attached. At the present time there is neither direct nor nonstop air pas-

senger service connecting this convenient facility with the City of Oakland or the City of Sacramento.

It is the conclusion of the leadership of this City that the commencement of air passenger service to Oakland will fill the growing needs of both the commerce and population in the entire California East Bay area as well as the industry and population centers serviced by Lockheed Air Terminal locally. Service to the City of Sacramento will enable the Burbank transportation facility to serve directly that portion of the thirty thousand monthly air trips required by state government which is directly concerned with the Northern half of the Los Angeles metropolitan area.

For these reasons the City of Burbank enthusiastically supports the tentative determination of the Civil Aeronautics Board to liberalizing the conditions and limitations of the certificated authority of Pacific Air Lines, Inc.

Respectfully yours,

/s/ Robert F. Brandon,

ROBERT F. BRANDON, MAYOR

RFB;WWA:lf

Attachment

**PLAINTIFFS' AND INTERVENING PLAINTIFF'S
EXHIBIT 47.**

[14 CFR Part 93]

[Docket No. 9113; Notice 68-20]

High Density Traffic Airports

**Notice of Proposed Rule Making and
Notice of Public Hearing**

The Federal Aviation Administration is considering amendments to Part 93 of the Federal Aviation Regulations that would prescribe special air traffic rules and other requirements for operations to or from airports designated in that part as high density traffic airports.

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket or notice number and be submitted in duplicate to: Federal Aviation Administration, Office of the General Counsel, Attention: Rules Docket GC-24, 800 Independence Avenue SW., Washington, D.C. 20590.

In addition to this notice, the agency will hold a public hearing at 9:30 a.m., Wednesday, September 25, 1968, at Federal Office Building 10A, 800 Independence Avenue SW., Washington, D.C. 20590, to receive the views of all interested persons on the high density traffic airports regulatory proposal. Interested persons are invited to attend the hearing and present oral or written statements on the matters set forth herein which will be made a part of the record of the hearing. Any person who wishes to make an oral statement at the hearing should notify the agency by Sep-

tember 18, 1968, stating the amount of time requested for his statement. All information presented at the hearing and all communications received by October 9, 1968, will be considered by the Administrator before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of the comments and information received. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons.

The hearing will be an informal hearing conducted by a designated representative of the agency under §11.33 of the Federal Aviation Regulations. It will not be a judicial or evidentiary type hearing so there will be no cross-examination of persons presenting statements. After all initial statements have been completed, those persons who wish to make rebuttal statements will be given an opportunity to do so in the same order in which they made their initial statements.

A transcript of the hearing will be made; anyone may buy a copy of the transcript from the reporter.

Delays of varying magnitude are encountered at many terminal areas, particularly at New York, Chicago, Washington, Boston, Miami, Los Angeles, San Francisco, and Atlanta. The situations at New York, Chicago, and Washington are the most critical. Congestion at these terminals frequently requires the imposition of traffic flow restrictions creating backup delays throughout the air transportation system.

A reduction in air traffic delays can be accomplished only by increasing the capacity of the system or decreasing the demand placed upon it. Certain changes in air traffic and airport procedures and practices are

already planned by the FAA to increase aircraft handling capacity. These changes include the postponement of the commissioning of new towers at noncritical locations; the elimination of precision approach radar service at some locations; the reduction in hours of towers operation from 24 to 16 at lower level activity locations; the reduction in the hours of operation of a number of flight service stations; the curtailment of VFR flight plan services; and the reallocation of positions, freed by these changes, to those facilities now experiencing congestion problems. In addition, the FAA is initiating accelerated and more effective recruiting and training programs for air traffic controllers.

The agency is also reviewing current "additional" services provided by its air traffic control system, with a view toward possible curtailment or abolition of some of those services which are not directly related to the separation of IFR traffic. These actions would be taken to reduce the work load on controllers and permit greater concentration on the movement and separation of traffic. The so-called "flow control system", which is an integral part of the FAA air traffic control system, is being refined and improved as part of an internal effort by the agency to more effectively and equitably regulate the flow of air traffic. This revamping of the flow control system will be completed and placed in operation within the next month.

Despite these improvements, FAA believes that regulatory action must be taken to alleviate congestion. Initially, the proposed regulatory actions would be directed to the Chicago, New York, and Washington areas. However, as congestion and delay increases in

other areas, regulatory control of demand would be extended as appropriate.

In arriving at the proposals contained in this notice, the FAA has consulted with industry organizations representing all major segments of aviation. A series of meetings has been held with representatives of these organizations and their comments and suggestions have been very helpful to the FAA in the development of this notice. The airport operators concerned have also been consulted in determining the allocation of operations at the airports.

The substance of the regulatory action would consist of the following amendments to Part 93 of the Federal Aviation Regulations;

1. Initially, John F. Kennedy, La Guardia, Newark, O'Hare, and Washington National Airports would be designated as high density traffic airports. At each of these airports a fixed number of IFR operations (take-offs and landings) per hour would be allocated for reservations.

In arriving at the number of IFR operations reservations proposed for each designated high density traffic airport, the FAA considered a number of variable factors including airport ground facilities, weather conditions, noise abatement procedures, aircraft mix, uniformity of flow, runway combinations, and the availability of alternative airports. Kennedy, La Guardia, Newark, O'Hare, and Washington National Airports would be allocated 80, 60, 60, 135, and 60 operations per hour, respectively. The specified figures are in excess of the capacities of the airports to handle IFR traffic in IFR conditions. They are selected on the basis that operations in these amounts, and additional opera-

tions, may be handled when weather conditions are better than IFR. It is believed preferable to fix the number of allowable reservations in the higher amounts, with the necessity of accepting traffic delays in IFR conditions, rather than employing lower figures, more representative of IFR capacity, which might result in unused capacity during good weather conditions. These allocations would be specified in Part 93 of the FARs as shown in § 93.123 of this proposal.

2. The proposed regulation would also allocate the reservations among the various classes of airport users. These allocations would be fixed only after additional consultation with the airport operators involved and the several classes of users and consideration of the comments and views provided by all aviation interests in response to this notice and in the hearing. The tentative allocations, on which comment is invited at this time, are specified in §93.123.

Allocations of IFR reservations would be made to three classes of users: (1) scheduled air carriers except air taxis; (2) scheduled air taxis; and (3) all other aircraft operators. In addition, scheduled air taxis would be granted any reservations not taken by the scheduled air carriers. In the event the total reservations allocated for the scheduled air carrier and scheduled air taxi operations were not taken by those operations for any hour, the remaining reservations would be available for other operations, principally, general aviation. Accordingly, IFR general aviation would be limited to the figures specified for "other" operations only when the other classes of users take all their allocated reservations.

Prior departure or arrival reservations would be required for each flight operated IFR to or from a designated high density traffic airport. Reservations will be granted by ATC within the limits of the IFR operations allocated in Part 93 for the particular airport. Air carriers would be able to obtain these reservations by publication of the flight schedules: *Provided*, That the flight schedules are within the air carrier allocations. Other operators would contact the nearest Flight Service Station by radio, phone, in person, or any other available means. Each one would furnish his estimated time of arrival at or departure from the high density airport involved. In the case of a flight from one high density traffic airport to another, both arrival and departure times would be furnished. His request would be processed through existing agency communications and the FSS would advise him either of the approval or the nearest available reservation. For flights between two high density airports, approved reservations for the takeoff and arrival would have to be obtained prior to takeoff. After receipt of the approval, the operator would file an IFR flight plan in the usual manner. If the operator subsequently determines not to use his approved reservation, he should cancel it at the nearest ATC facility. An approved reservation would not constitute a warranty against traffic delays.

Under the proposed regulation, the use and cancellation of approved reservations would be on the honor system. In the event operations under the regulation, if adopted, demonstrate the necessity for more stringent provisions or sanctions, these would be added to the regulation.

3. In order to facilitate the flow of IFR operations allocated for the high density traffic airports, aircraft operating under an IFR allocated reservation would be required to be capable of maintaining an airspeed of not less than 150 knots while under control jurisdiction of the approach control ATC facility. In addition, all aircraft operating IFR to or from a high density traffic airport would have to be equipped with an operable coded radar beacon transponder having at least a Mode A/3 64 code capability replying to Mode A/3 interrogation with the code specified by ATC; and have a second pilot.

4. Operations in excess of the number allocated for reservation at a particular high density traffic airport would also be permitted under additional reservations granted by ATC. These would be applied for under the procedures applicable to the allocated reservations and would be granted when, due to weather or other factors, the operation could be accommodated without adverse effect on the allocated operations for the particular airport. The excess operations may be IFR, or VFR, i.e., ceiling of at least 1,000 feet and visibility of 3 miles reported at the high density traffic airport. Aircraft authorized to operate VFR on this basis need not meet the performance capabilities, flight crew and equipment requirements prescribed for the allocated operations.

If the appropriate airport and air traffic facilities are available, STOL, VTOL, helicopter, and other operations would be accommodated where possible to do so without interference with the aircraft operations under allocated reservations. These excepted operations would be accommodated on a procedural basis by agreements

between aircraft and airport operators and the appropriate ATC facility. The agreement may relieve the operator from the requirements of Subpart K.

The proposed allocations of reservations reflect the obligation of the Department of Transportation to provide for efficient utilization of the airspace and recognize the vital role of the certificated common carriers' scheduled operations in air transportation. For example, these air carrier operations would be given all of the allocated reservations during the peak traffic hours of 5 p.m. to 8 p.m. at Kennedy International Airport. The proposal recognizes a greater priority for scheduled air taxi operators as they are also common carriers of the public. The proposal takes into account the relative inflexibility of scheduled operations compared to unscheduled operations. The proposal accommodates all classes of users and no one would be totally denied access to any of the named airports. The proposed restrictions will affect all users if adopted.

The proposed distribution would require a reduction in scheduled certificated air carrier flights during certain hours. It is anticipated that the affected carriers will reach voluntary agreements as to how that reduction will be accomplished, subject to any Civil Aeronautics Board requirements.

In consideration of the foregoing, it is proposed to amend Part 93 of the Federal Aviation Regulations as hereinafter set forth:

1. Amend § 93.1 by adding a new paragraph (e) to read as follows:

§ 93.1 Applicability.

(c) Subpart K of this part designates high density traffic airports and prescribes air traffic rules and other requirements for operating aircraft to or from those airports.

2. By adding a new Subpart K to read as follows:

**Subpart K—High Density Traffic
Airports**

§ 93.121 Applicability.

This subpart designates high density traffic airports and prescribes the aircraft equipment and performance requirements, pilot requirements, and air traffic rules for operating aircraft to or from those airports.

§ 93.123 High density traffic airports.

(a) Each of the following airports is designated as a high density traffic airport and, except as provided in § 93.129 and paragraph (b) of this section, is limited to the hourly number of allocated IFR operations (takeoffs and landings) that may be reserved for the specified classes of users for that airport:

IFR OPERATIONS PER HOUR

Class of user	John F. Kennedy Airport	LaGuardia Airport	Newark Airport	O'Hare Airport	Washington Airport
Scheduled air carriers					
except air taxis.....	70	48	40	115	40
Scheduled air taxis	5	6	10	10	8
Other	5	6	10	10	12

(b) The allocations of reservations under paragraph (a) of this section among the several classes of users do not apply 12 midnight to 6 a.m. local time, but the total hourly limitation remains applicable. The allocations of reservations under paragraph (a) of this section at John F. Kennedy Airport do not apply from 5 p.m. to 8 p.m. local time. During those hours, the

total 80 reservations are allocated to scheduled air carriers except air taxis. In the case of Washington National Airport only, the allocation of 40 reservations under paragraph (a) of this section does not include extra sections of scheduled air carrier flights which may be conducted without regard to the limitation of 40 reservations. Any reservation under paragraph (a) of this section allocated to, but not taken by, scheduled air carrier operations is available for a scheduled air taxi operation. Any reservation under paragraph (a) of this section allocated to, but not taken by, a scheduled air carrier or scheduled air taxi operation is available for other operations.

§ 93.125. Arrival or departure reservation and flight plan.

Unless otherwise authorized by ATC in a letter of agreement under §93.120 (c), no person may operate an aircraft to or from an airport designated as high density traffic airport unless—

(a) He has received for that operation an arrival or departure reservation from ATC; and

(b) He has filed under an IFR or VFR flight plan for that operation.

§ 93.127 Aircraft and pilot requirements.

(a) Unless otherwise authorized by ATC in a letter of agreement under § 93.129(c), no person may operate an aircraft IFR to or from a high density traffic airport unless the aircraft—

(1) Is equipped with an operable coded radar beacon transponder having at least a Mode A/3 64 code capability, replying to Mode A/3 interrogation with the code specified by ATC, and

(2) Has a minimum flight crew of two pilots.

(b) No person may operate an aircraft to a high density traffic airport under a reservation allocated in § 93.123 unless the aircraft is capable of maintaining an airspeed of not less than 150 knots while under the control jurisdiction of the ATC approach control facility for that airport.

§ 93.129 Additional operations.

(a) *IFR*. The operator of an aircraft may take off or land the aircraft under IFR at a designated high density traffic airport without regard to the maximum number of operations allocated for that airport if he obtains a departure or arrival reservation, as appropriate, from ATC. The reservation is granted by ATC whenever the aircraft may be accommodated without adverse effect on the operations allocated for the airport for which the reservation is requested.

(b) *VFR*. The operator of an aircraft may take off or land the aircraft under VFR at a designated high density traffic airport if he obtains a departure or arrival reservation, as appropriate, from ATC. The reservation is granted by ATC whenever the aircraft may be accommodated without adverse effect on the operations allocated for the airport for which the reservation is requested and the ceiling at the airport is at least 1,000 feet and the ground visibility reported at the airport is at least 3 miles. A VFR operation conducted under this paragraph (b) is not required to comply with the aircraft and pilot requirements of § 93.127.

(c) *Operations under letters of agreement*. The operator of an aircraft may take off or land the aircraft under either IFR or VFR at a designated high density

traffic airport if he operates the aircraft without interference to any other aircraft operation and the operation is under the terms of a letter of agreement with the airport management and the appropriate ATC facility. An operation conducted under this paragraph (c) is not required to comply with the aircraft and pilot requirements of § 93.127 except to the extent specified in the applicable letter of agreement.

These amendments to Part 93 of the Federal Aviation Regulations are proposed under the authority of sections 103, 307 (a), (b), and (c), 313(a), and 601 of the Federal Aviation Act of 1958 (49 U.S. 1303, 1348 (a), (b), and (c), 1354(a), and 1421).

Issued on September 3, 1968, in Washington, D.C.

D. D. Thomas,

Acting Administrator.

[F.R. Doc. 68-10828; Filed, Sept. 4, 1968; 10:23 a.m.]

PLAINTIFFS' AND INTERVENING PLAINTIFFS EXHIBIT 48.

Part 93—Special Air Traffic Rules and Airport Traffic Patterns

High Density Traffic Airports

The purpose of this amendment to the Federal Aviation Regulations is to continue in effect special air traffic rules for high density traffic airports which expire on December 31, 1969.

The amendment was proposed in Notice 69-51 and published in the Federal Register on November 15, 1969 (34 F.R. 18312.) In the notice the FAA proposed to continue the rules for a period of 9 to 12 months. In this connection, the public was advised that during the 4-month period the rules have been in effect, the FAA has determined that the congestion problem has improved and delays substantially reduced as compared to the situation a year ago, but that because there still has not been any substantial change made to the National Airspace system, the restraining influence of these rules is still necessary.

In response to this notice, 42 public comments were received from segments of the aviation industry, public officials and other interested persons. In general, the comments from industry representatives for the scheduled air carrier class of user supported the proposed extension. On the other hand, the preponderance of the comments from organizations and individuals from general aviation or "other" class of user opposed any extension of the rules. More specifically, the objections

from the latter group can be catalogued as falling into five types:

1. The rules are ineffective.
2. The rules discriminate against private and corporate airspace users.
3. The rules have an adverse impact upon general aviation and fixed base operators.
4. The rules impose rigidity upon operations that must be inherently flexible.
5. Congestion is caused by airline overscheduling.

Each of these objections was extensively argued by individuals, organizations and representatives of various corporations during the public hearing held in connection with this rule on September 25 and 26, and October 3, 1968. Also, these various objections were the subject of written comments to the notice of proposed rule making as well as the subject of many letters received and answered by the FAA since issuance of the original notice on September 3, 1968 (Notice 68-20). In view of this, further discourse to answer each objection appears unnecessary. The FAA experience, as indicated by statistical study covering the 4-month period subsequent to the issuance of the rules has shown that none of the users have been deprived of the use of any of the five high density traffic airports, except on infrequent occasions, and only during the early evening hours. These factors indicate that based upon actual experience, the present rule appears to be operating satisfactorily.

The comments from the scheduled air carriers and other groups associated with that segment of the industry, supported an extension of the rule. Significantly, only two comments from this group dealt with

the length of the proposed extension. In both cases, the Port of New York Authority and the Air Transport Association agreed that an extension up to 1 year was acceptable.

Several other commentators from this group individually suggested that the rules should be made effective only during the summertime or during hours when jet operations are permitted at a particular airport. We cannot adopt either of these two recommendations at this time because we lack sufficient statistical and operational air traffic support to permit deviation from the present uniform application of these rules. However, we will continue to study this aspect of the rules to the end that if circumstances permit, we will accordingly modify the rules.

In the rules issued on December 2, 1963 (Amdt. 93-13), we advised the public that the FAA would continue making procedural improvements in order to increase the ATC capability and to alleviate, as much as possible, the inconvenience that may be sustained by certain aircraft operators. In consonance with this pledge, the FAA order outlining operational procedure is being revised and will provide a longer lead time for securing IFR reservations and provide extra time in advance of holidays. VFR reservation procedures will also be simplified. These changes should eliminate some of the inconvenience to general aviation pilots operating to and from the high density airports.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to all matter presented. In other respects, for the reasons stated in the preamble to the notice, the amendment is adopted as prescribed herein.

In consideration of the foregoing, Part 93 of the Federal Aviation Regulations is amended effective January 1, 1970, as follows:

§ 93.131 Termination date.

The provisions of §§ 93.121—93.129 terminate October 25, 1970.

(Secs. 103, 307 (a) (b), and (c), 313 (a) 601, Federal Aviation Act of 1958 (49 U.S.C. 1303, 1348 (a), (b), and (c), 1354(a) 1421; sec. 6(c), Department of Transportation Act (49 U.S.C. 1665(c); § 1.4(b), Part 1 of the regulations of the Office of the Secretary (49 CFR 1.4(b)).)

Issued in Washington, D.C., on December 22, 1969.

J. H. Shaffer,

Administrator.

[F.R. Doc. 69-15356; Filed, Dec. 24, 1969; 8:47 a.m.]

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

PLAINTIFFS' AND INTERVENING PLAINTIFFS EXHIBIT 51.

CONTINENTAL AIR LINES MINIMUM CANCELLATIONS REQUIRED BY A 2300-0700 NATIONWIDE TAKEOFF CURFEW AUGUST 29, 1970, SCHEDULE

Aircraft Type	Flight Number	Segment	Daily Aircraft Miles	Percent of Domestic System Aircraft Miles
J	420	Seattle—Portland only	—	
	429	Portland—Seattle only	258	
	427	Houston—Seattle	—	
	430	Seattle—New Orleans	4,415	
	425*	New Orleans—Houston	304	
	54	Los Angeles—Houston	—	
	55	Houston—Los Angeles	2,802	
	66	Los Angeles—Houston	—	
	109*	Houston—Los Angeles	2,786	
	45	Denver—Colorado Springs	—	
	20	Colorado Springs—Denver	134	
	56	Los Angeles—Houston	—	
	65*	Houston—Los Angeles	2,836	
	16	Denver—Chicago	—	
	35	Chicago—Denver	1,855	
	712	Los Angeles—Chicago	—	
	11	Chicago—Los Angeles	3,608	
	606	Los Angeles—Chicago	—	
	5	Chicago—Los Angeles	3,488	
C9	156	Los Angeles—Amarillo	—	
	180	Amarillo—Dallas	1,589	
	181*	Dallas—Los Angeles	1,302	
	128	Los Angeles—Houston	—	
	159	Houston—Los Angeles	2,849	
	177	Midland—Albuquerque	—	
	190	El Paso—Midland	897	
	@	Albuquerque—El Paso	—	
	151	Denver—El Paso	—	
	134*	El Paso—Denver	1,132	
TOTAL			30,255	14.99

Cancellation required to balance aircraft.

Ferry Flight

**PLAINTIFFS AND INTERVENING PLAINTIFFS
EXHIBIT 55.**

Aviation Development Council

Room 324, Hangar No. 2 (U.A.L.)

La Guardia Airport

Flushing, N.Y. 11371

(212) 457-7890

20 May 1966

**Honorable Mario J. Cariollo
President of the Borough of Queens
120-55 Queens Boulevard
Kew Gardens, New York**

Dear Mr. Cariollo:

At your request, the Aviation Development Council in behalf of the aviation industry has considered the probable consequences of the imposition of a curfew on night-time operations at the major airports in the New Jersey-New York Metropolitan Region.

Turner and Koni, consultants, was retained to assist the ADC in this review.

Although we are fully aware that a curfew would have a deleterious effect upon the aviation industry itself, we considered only the consequences of such a curfew upon the public convenience and necessity, which is a legal requirement imposed upon the air carriers by the Federal Aviation Act of 1958, the consequences upon the economy, and the consequences upon the problem of aircraft noise.

In the course of our review, we assumed that a curfew would be in effect at all three major regional airports—Kennedy International, La Guardia and New

and would be followed by a similar curfew at major airports throughout the nation.

The Effect Upon the Problem of Aircraft Noise

We recognized, of course, that your primary interest in this study was to see whether a curfew would alleviate the noise problem without overly serious off-setting consequences, such as disruption of services to the Queens community at large, i.e., mail, cargo, elimination of the availability of round the clock service for use in case of all sorts of emergencies (family illness or death, transportation of medical supplies and equipment, business emergencies, etc.), loss of jobs through loss of business, and increased noise at other times. We recognized that the curfew would by hypothesis cut down aircraft noise substantially during the curfew hours although it could not be eliminated. The airport would have to remain open to service flights delayed by weather or other adverse conditions, to service emergency landings and take-offs, and to permit emergency repairs.

Some of these other off-setting factors are considered later in this letter. Addressing ourselves at the moment only to noise, we learn that flights cancelled during the curfew hours would have to be replaced as near as possible (outside the curfew hours) and that most of the services would have to be replaced during the hours immediately preceding the beginning of the curfew, i.e., between 9:00 p.m. and midnight. As you are aware these hours already, of necessity, include large numbers of flights and, based on complaints, are the period of greatest annoyance in the communities.

Accordingly, contrary to what might appear superficially to be the case, the curfew would seriously aggravate aircraft noise in the communities in the hours when the greatest annoyance already occurs. While this in itself would seem to make the curfew idea unsound as a noise abatement device, we know you will also be interested in the following paragraphs which indicate some of the adverse effects to jobs, mail deliveries, flight services and industry.

Its Effect Upon Local Mail Service

The United States Post Office informed us that "a midnight to 7 a.m. curfew would be disastrous to the movement of mail by air out of and into the Metropolitan Region. It would mean (1) second day delivery to a majority of those points which are now receiving next morning delivery, (2) diversion of some mail to surface transportation, (3) the economy of the New York area would suffer by not being able to communicate or ship parcels for next morning delivery, and (4) since, generally, mail moves at night and passengers in the daytime, serious overloads and traffic congestion would result."

An estimated 28,800,000 letters would have been seriously delayed in the New Jersey-New York Metropolitan Region had there been a curfew during June 1965, according to a study by the Post Office Department.

About 55 per cent of these letters were regional mail; the remainder were transit, moving through New York to other destinations. If 7 a.m. were the earliest arrival time, all of the transit mail plus local residential mail would have been delayed at least twenty-four hours. Local business mail would not have been available before the third business delivery.

With an outgoing volume about equal to incoming mail, about one billion letters a year would be seriously delayed because of a curfew.

According to Postmaster General Lawrence F. O'Brien, the Post Office Department plans to abolish the distinction between first class and air mail "to provide a new class of priority mail that will be delivered overnight almost anywhere in the country."

To provide overnight delivery, mail must be transported during the night. Because mail volume reflects the daytime activities of the public, its accumulation, sorting and transportation to and from the airports, as well as its shipment, take place largely after the close of the business day. The volume is such in New York that the pace has not slackened by 1.a.m. Consequently, night hours must be utilized to move the bulk of the mail.

To permit overnight delivery, mail flights from New York have been selected to dovetail with surface transportation schedules. A change of 45 minutes has result in missed connections, causing a twenty-four hour delay in deliveries.

It is obvious that a curfew on night-time operations at the airports would seriously impede the movement of mail and make overnight delivery impossible.

The Effect Upon Scheduled Service

A curfew upon operations between midnight and 7 a.m. would cause the cancellation of and deprive the public of 1,107 weekly night services between New York City and 43 communities. In addition, another 1,357 weekly day services between New York City and 61 communities would have to be cancelled in or-

der to balance equipment, i.e., to have aircraft in the proper location for trips. Many of these latter services occur during the hours of greatest demands.

The cancellation of the 2,464 day and night scheduled services would affect people, too. An estimated 1,075,000 persons annually fly in and out of the Region's airports at night for a variety of reasons. Some do so for business reasons; others because of emergencies; some to stretch vacations; others to take advantage of reduced fares available at night. Whatever the reason, a curfew would deprive those one million people of an essential service.

The effect of time zone changes on service to the East Coast from the West Coast, with a curfew in effect, has far reaching consequences on the adequacy of service that could be provided. For these cities which can support non-stop service from the West Coast to New York, except for the sixty-minute period between 11 p.m. and the beginning of the midnight curfew on the West Coast, the public would be deprived of East-bound service from 4 p.m. until 7 a.m. the following morning. If any allowance is to be made for the delayed arrival problem that will inevitably arise, it would be nearly fifteen hours out of every twenty-four that two of the most populous states in the nation would be without air transportation from West to East.

As many as 26 communities with relatively infrequent direct or connecting service to the Region would experience a deterioration in their last service East-bound. For example, without a curfew the latest flight to New York from Huntsville, Alabama, is 9:26 p.m. With a curfew, the latest flight would be 4:50 p.m.

Its Effect Upon Air Cargo

Because most air cargo moves at night, the cancellation of 1,107 weekly night services because of a curfew would have its most severe impact upon the air cargo industry, upon the hundreds of leading industries which rely upon air cargo for shipment of its goods, and, of course, upon their many thousands of employees.

The free movement of people and goods is indispensable to American economic life. The unrestricted flow of goods, in particular, has become increasingly important to innumerable industries and business. The United States in the jet age is five and one-half hours wide and two and one-half hours deep. By taking advantage of the jet's speed, a New York manufacturer can develop a San Juan market as competitively as he can develop Pittsburgh. The vast Los Angeles market is as close to New York by jet as the smaller Buffalo market is by truck. To service such a market, however, the New York manufacturer must make use of air transportation between midnight and 7 a.m. for next morning delivery on the West Coast to match the delivery that would be made by a West Coast manufacturer.

The fact that the largest air cargo center in the world is at Kennedy International Airport illustrates how vital air cargo has become to the Region. More than 600,000 tons of air cargo, or about 15 per cent of the United States total, is shipped through the Region's three airports, and this is increasing rapidly (about 50 per cent in 1965).

The cancellation of night services because of a curfew would require the cancellation of 607 all-cargo

services, or 42 per cent of the Region's total all-cargo service.

Its Effect Upon Industry

The loss of 42 per cent of its capability to move goods at night would seriously affect the economy of the Metropolitan Region, as well as that of the nation. In addition, it would seriously inhibit future growth, not only of air cargo itself, but of the economy.

Its effects upon the economy of Queens County, of all the Region, would be immediate. A survey of commodity shipments indicated that 22 per cent of the total air cargo shipments into and out of the Region were electrical equipment, machinery and supplies which, as you know, are a vital part of the Queens and Long Island manufacturing industry.

Other segments of local industry would equally be affected. Shipments of printed matter and wearing apparel, both of which are important Regional industries, accounted for 20 per cent of the Region's air cargo traffic.

To a great extent, total costs in manufactured goods come from savings in reduced inventory, which air cargo permits, while at the same time improving customer service. Although there is agreement among diverse business activities that the ability to service customers would deteriorate and total cost would increase if air cargo were severely curtailed, an attempt to show a specific dollar amount is difficult. Several significant examples, however, are shown below:

To competitively service 261 branches within the United States, American Optical, located in the Region, stocks 60 service centers with 30,000 ophthalmic prod-

sets. Orders for out-of-stock items are received by teletype between 2:30 p.m. and 6 p.m. By 8 p.m., orders are on their way to the airport for a next morning delivery. In ten years, American Optical has reduced its ratio of inventory-to-sales from 43 per cent to 27 per cent. Overnight delivery is utilized for 20 per cent of the more complex products which are centrally located.

Raytheon, with eight domestic divisions consisting of 37 plants and laboratories throughout the United States, is a pioneer in using air freight as an integral part of its distribution system. Through a program called "Rayair," it envisions eventual establishment of four-to-six distribution-assembly points, each serving a 200-300 mile radius area. The volume of fact turnover items in inventory thus can be kept to a minimum, and slower items can be stocked only at the point of manufacture.

The New York fur industry makes about 900 fur shipments each night for next-day delivery. This capability for overnight delivery has enabled it to retain its preeminent position over other centers, such as Chicago, Dallas and Los Angeles.

Car manufacturers are one of the biggest users of air freight to maintain an unbroken production run. Delay in subcontractor's production can stop production in the main assembly plant. But by making a priority production run of the item causing the delay and by shipping parts overnight by air, costly production delays and stoppages are avoided.

The effect of cancellation of night service upon perishables would be more immediate. Each day, 3,000 pounds of fresh cut flowers are picked on the West Coast and packed and flown to New York where they

are processed by the wholesaler and delivered to the retailer in time to allow him a full selling day. Arrival before midnight would require refrigeration and extra handling which would increase costs; arrival after 7 a.m. would not provide sufficient time for selling.

Over 12.6 million pounds of fresh strawberries a year are flown from California to cities throughout the country; much of it to the New Jersey-New York Metropolitan Region. By keeping the time between harvest and consumption at a minimum, about 20 percent is saved in decreased spoilage. A curfew would result in increased spoilage as well as increased handling costs.

About 10,000 pounds of Chinese vegetables are flown daily from the West Coast. The harvesting, packaging, flying and distribution to restaurants is accomplished during the night hours. Early morning preparation of fresh crisp produce for noon and evening menus could not be accomplished, if the night hours were not available. Refrigeration or spoilage, plus extra handling, would increase costs.

Some newspapers prepared during the night for morning delivery are another type of perishable that would be affected by a curfew. The *New York Times* sells in 11,464 cities and towns in the United States, as well as in Canada, the Caribbean and South America.

With a different type of paper, such as the *Daily News*, the daily shipment of 28,500 papers by air at night represents a New York business which is making use of air cargo to expand its market in direct competition with local papers in other areas.

Five nights a week, 25,000 copies of the *Wall Street Journal* are flown by chartered plane from Westfield,

Mass., to Newark Airport, normally arriving about 1 a.m. for local distribution. Use of night-time hours is necessary for printing and distribution in order to make the paper available to subscribers and at newsstands in the morning.

These are only examples of the far-reaching effects a curfew would have upon different types of business. There are, of course, many more. The effect upon those New York businesses which service a national market, in particular, would be most serious. Because of their inability to compete with regional businesses, they would either shrink to a regional business themselves or have to relocate to a city which provides unrestricted air transportation. Either way, there would be fewer jobs available in the Region.

The delays in the shipment of air cargo caused by a curfew would increase considerably the costs of doing business for innumerable industries because of increased investment in inventories, greater losses, through increased spoilage and higher costs from increased handling. Increased costs of doing business, in turn, detrimentally affect the number of jobs available.

Its Effect Upon the Banking Industry

A curfew would cost New York banks \$34,870,000 a year in lost interest, so extensive is the finance industry's use of consolidated air express shipments on night flights for daily transactions, according to the Federal Reserve Bank and the New York Clearing House.

Its Effect Upon the Department of Defense

The loss of night-time services would cost the Department of Defense an additional \$7,750,000 annually for the transportation of personnel. The DOD is a large user of night coach fares for the movement of military personnel. In Fiscal Year 1965, the DOD used commer-

cial air carriers to transport 1,900,000 persons at a cost of \$117,700,000. Many of these movements are at night because aircraft become available for charter or because night-coach rates are available. A curfew on night-time operations, of course, would remove these opportunities, requiring all movements to be made during day-time operations at the higher rates.

Summary

It has been suggested that a curfew upon night-time operations at the Metropolitan Region's three major airports would alleviate the problem of aircraft noise in the community. On the contrary, it would seriously aggravate the problem because of the need for increased scheduling between 9 p.m. and midnight, the very hours of greatest annoyance.

In addition, such a curfew would cause the cancellation of 2,464 weekly services at the Region's three major airports. The loss of these services, in turn, would deprive about one million passengers annually of a vital service. It would cost \$34,870,000 annually in lost interest because the Federal Reserve Bank and the New York Clearing House could not process checks. About one billion letters annually would be seriously delayed.

The Metropolitan Region would lose about 42 per cent of its air cargo capability, resulting in far-reaching and deleterious effects upon industry and business in the Region, as well as throughout the nation. This detrimental effect would eventually manifest throughout the Region in a serious loss of jobs available.

I trust this information will be helpful in understanding the situation. I shall be pleased to meet with you if you should desire to discuss the subject further.

Sincerely,

/s/ James T. Pyle

JTP:sw

PLAINTIFFS' AND INTERVENING PLAINTIFF'S EXHIBIT 56.

**(Only That Portion Which Includes Pages 13 and 14 Up
to the Section Designated "Development Criteria".)**

SECTION II

THE PLAN

Dimensions of the National Airport System

The Federal Airport Act of 1946, as amended, directs the development of a national plan for "a system of public airports adequate to anticipate and meet the needs of civil aeronautics . . . not . . . limited to any classes or categories of public airports . . . take into account the need of both air commerce and private flying . . . technological developments . . . (and) probable growth and requirements of civil aeronautics. . . ."

The first section of this narrative discussed the various forms of air travel and their effects on civil aviation. In particular, it stressed the role of the airport as a vital component of the air transportation system. It has shown that the increased public utilization of air carrier, air cargo, and general aviation has resulted in an urgent need for additional airport development.

This section defines the criteria which have been used in establishing a national system of airports, the effects on this system of long range requirements imposed by advances in aircraft technology, and includes a compilation by type of the landing facilities which comprise the 1968 Amendment to the National Airport Plan.

DEVELOPING THE AIRPORT SYSTEM: ENTRY AND DEVELOPMENT CRITERIA

There are currently on record with the FAA over 10,000 landing facilities (airports, seaplane bases, and

heliports) in the U.S. These range from the largest air carrier airport to the smallest turf strip built by the owner for his private use. Obviously, inclusion of an airport in a national system is not justified merely by virtue of the fact that it exists.

The criteria for inclusion of a landing facility in the national airport system and the type of development needed to bring such facility into full utilization as part of the system are predicated on a national interest derived from a local need for access to the national air transportation network.

An important consideration of these criteria is the need to serve the greatest number of people efficiently with a minimum of well-located and well-designated facilities. This avoids the expensive proliferation of airports. This criterion may be established as a time/distance limitation relative to the location of airports to the people served. Another approach is to encourage development of regional airports (single air carrier airports to serve two or more communities). The subject of regional airports is discussed in detail in Section III.

Entry Criteria:

The criteria used to establish the listing of locations and airports (Section IV of this report) are based on the principle of the need of a community for air transportation in relation to a national interest. Such a national interest is assumed when one or more of the following conditions exists: (1) a requirement for scheduled airline passenger service; (2) a substantial degree of nonlocal aviation activity; (3) lack of other modes of transportation; and (4) a local economy dependent upon air transportation for its contribution to the gross national product.

Airports included in the NAP are broken down into two main functional categories:

1. *Airports to accommodate airline service* include existing airports presently receiving airline service and communities designated to receive airline service to fulfill a "certificate of public convenience and necessity" issued by the Civil Aeronautics Board. Also, new or supplemental air carrier airports are included for areas in which a high degree of aeronautical activity indicates a need. Replacement airports may be included in the Plan in areas in which an existing air carrier airport cannot be economically expanded to accommodate projected traffic. A regional airport to serve two or more communities is included where such is considered a more feasible solution to meet long-range requirements than expansion of existing airports in the communities affected.

2. *Airports for general aviation use only* are included in the Plan under a variety of conditions.

An airport or location is included if it has been designated as an integral part of a *metropolitan area airport system*, as defined in a study which has been conducted locally and concurred in by FAA. Such airports take precedence over other airports in the area which have not been shown to be necessary entities in the integrated system. Non-metropolitan communities with airline-served airports do not normally require separate airports to serve general aviation only.

An airport which can serve to divert general aviation traffic from a congested airline-served airport in substantial quantity can be entered in the Plan as a "reliever" airport. A congested air carrier airport, for the purpose of these criteria, is one which has ex-

perienced total annual aircraft operations in excess of 60% of the capacity of the airport and includes at least 30,000 annual operations by the air carriers and high-performance military aircraft using the field.

Where *air taxi service* is provided on a regular basis throughout the year (at least two flights a week) or where extended seasonal services is indicated, the airport may be included in the NAP.

An *airport which serves the business interests of the community* may be included if there is evidence of considerable use by based aircraft owned or leased by local business concerns or by transient aircraft visiting the community for the conduct of business which is essential to the economic well-being of the area served. In communities served adequately by an air carrier airport, a separate airport for business aircraft would not be justified for inclusion in the NAP unless other factors warranting such inclusion were evident.

An airport or location may be entered in the Plan where there is evidence of *inadequate access to another NAP airport* by at least 10 aircraft owners. This is considered only when such owners would otherwise be at least 30 minutes ground travel time from the nearest adequate airport.

An airport which provides *access to a recreation area or facility* open to the public may be included if there is an indication of extensive use of the airport by visitors to the recreation facilities. These facilities include national parks, forests, and monuments.

Where a community may be isolated due to lack of adequate surface transportation, it may be included in the Plan. Also, locations which would otherwise be isolated during certain seasons due to the climate may be included.

Thus, there are several different criteria considered in developing the locations of airports in the national system. In the main, the system described is composed of existing, publicly owned civil airports or communities where development of such airports is recommended. Two exceptions to this rule governing entry criteria concern privately owned airports and military fields.

Private airports which meet the above criteria may be included in the NAP if they are now and will continue to be open to the public, if the facilities are adequate or may be expanded to meet recommended development needs, and if a more desirable location is not evident. Certain high-activity, privately owned airports are also included if a Federal interest has been expressed through provision of facilities such as an air traffic control tower, even though these airports do not necessarily meet the expansibility criteria. Acquisition of such fields by an eligible public body is encouraged wherever possible.

Military airports are included in the Plan only where joint use by civil aircraft is permitted and where requirement for such usage exists.

DEFENDANTS' EXHIBIT A.

**EMERGENCY CONDITIONS JUSTIFYING a
JET DEPARTURE DURING CURFEW
HOURS**

1. Delay of a flight which had been scheduled for departure prior to 2300 due to:

Mechanical problems

Weather

Air traffic control procedures

In these instances with the potential of many passengers being affected, we would have the range of emergency trips, disruption of vacation and business arrangements as well as the economic hardship for the passengers and the airlines.

2. Departure delayed due to bomb threat—aircraft delayed for search of aircraft, passengers and baggage.
3. Weather conditions causing aircraft to land here in place of a previously planned airport. When the weather permits, the aircraft should be allowed to resume its flight to avoid further disruption of the airlines' aircraft scheduling.
4. Medical emergency flights such as flying serum or other medical supplies and ambulance flights.
5. Military flights where the pilot states that an emergency exists.
6. Flights transporting personnel to work on government projects. If, due to the curfew, these people would be unable to get to their destination when needed, then the delay would not be in the national interest.

7. An aircraft which had to land here because of emergency conditions such as the illness of a passenger or a mechanical condition of the aircraft, should be allowed to depart as soon as the emergency condition is rectified.
8. In the interests of national security, corporate jets are sometimes required to depart during what would be curfew hours to enable officials to attend critical meetings with regard to government contracts.
9. The departure of an aircraft used in fighting fires or to transport personnel to fight a fire.

DEFENDANTS' EXHIBIT A-1.

Office of City Attorney

City of Burbank

California

May 1, 1970

Mr. David M. Simmons

President

Lockheed Air Terminal

2627 North Hollywood Way

Burbank, California 91502

Dear Dave:

The list of emergency conditions justifying a jet departure during curfew hours furnished by your office appears reasonable and will be used by the Police Department at least for the time being. In addition, the 6:40 A.M. charter flight by Lockheed-California specialists to Palmdale each working day has been cleared as an emergency flight.

If there are any modifications, you will be notified.

Very truly yours,

SAMUEL GORLICK

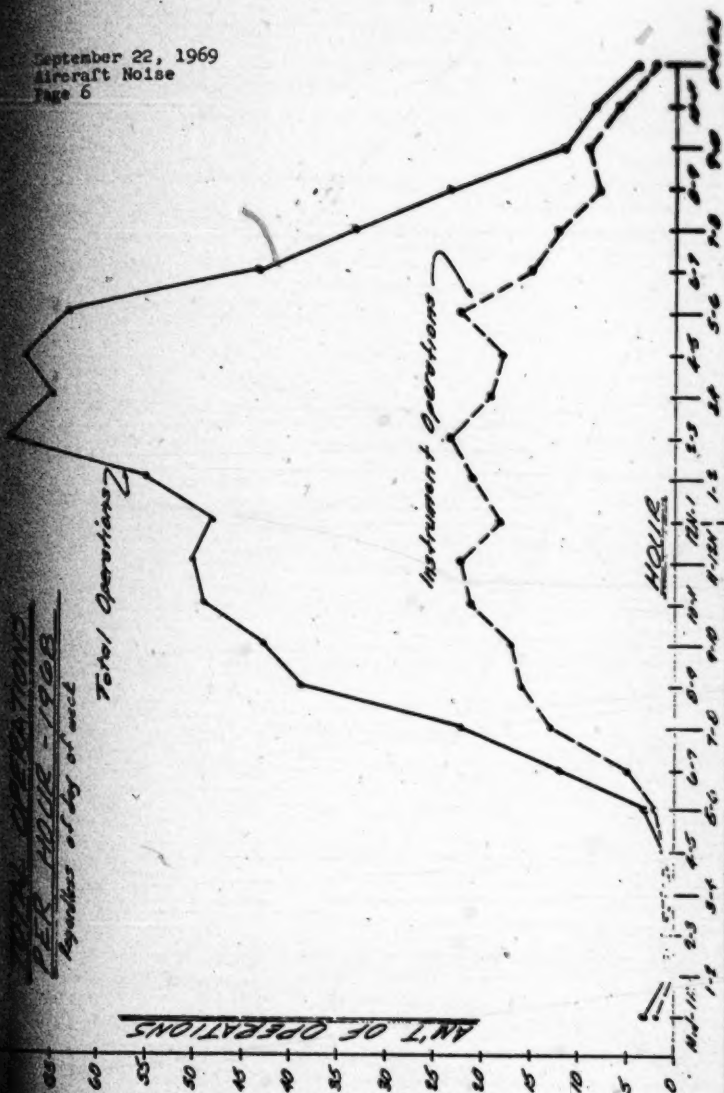
City Attorney

SG:lh

cc: City Manager

Chief of Police

September 22, 1969
Aircraft Noise
Page 6



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IN THE
Supreme Court of the United States

October Term, 1971

No.

THE CITY OF BURBANK, a municipal corporation; DR. JARVEY GILBERT, Mayor; ROBERT R. MCKENZIE, Vice Mayor; Councilman GEORGE W. HAVEN; Councilman ROBERT A. SWANSON; Councilman D. VERNER GIBSON; JOSEPH N. BAKER, City Manager; SAMUEL GORLICK, City Attorney for the City of Burbank and REX R. ANDREWS, Chief of Police of the City of Burbank,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., a corporation, PACIFIC SOUTHWEST AIR LINES, a corporation, and AIR TRANSPORT ASSOCIATION OF AMERICA,

Appellees.

On Appeal From the United States Court of Appeals
for the Ninth Circuit.

JURISDICTIONAL STATEMENT.

Appellants appeal from the final judgment of the United States Court of Appeals for the Ninth Circuit, entered on March 22, 1972, which held invalid, as repugnant to the Supremacy Clause of the United States Constitution (Article VI, Clause 2), an ordinance of the City of Burbank, and submit this Statement to

show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial and important questions are presented.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 457 F.2d 667. A copy of that opinion is attached hereto as Appendix A. The opinion of the United States District Court for the Central District of California is reported in 318 F.Supp. 914.

JURISDICTION.

This suit was brought under 28 U.S.C. §§1331(a) and 1337 to have the District Court declare invalid and enjoin the enforcement of Ordinance No. 2216 of the City of Burbank as being repugnant to the Due Process Clause (XIV Amendment), the Commerce Clause (Art. I, Sec. 8, Clause 3), the War Powers Clauses (Art. I, Sec. 8, Clauses 11-14) and the Supremacy Clause (Art. VI, Clause 2) of the Constitution of the United States [R. 1-10].

Appellees subsequently abandoned any contention that the ordinance was repugnant to the Due Process Clause (XIV Amendment) and the War Powers Clauses (Art. I, Sec. 8, Clauses 11-14), and withdrew these issues from the District Court's consideration [R. 89-93; R.Tr. 436-38].

The District Court declared the ordinance unconstitutional, illegal and void, as repugnant to the Supremacy Clause and the Commerce Clause, and enjoined its enforcement [R. 278-310].

The Court of Appeals, in deciding the case, limited itself to the issue whether the ordinance was repugnant

to the Supremacy Clause in two aspects, namely, (1) preemption and (2) conflict. While there was unanimity on the conflict issue and affirmance of the judgment of the District Court, one of the three judges refused to concur in that portion of the opinion which dealt with the preemption issue [Appendix A].

The judgment of the United States Court of Appeals was entered on March 22, 1972. Notice of appeal to this Court was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit on May 15, 1972. A copy of this Notice of Appeal is attached hereto as Appendix B.

The jurisdiction of the Supreme Court to review the decision of the United States Court of Appeals, by appeal, is conferred by Title 28, United States Code, Section 1254(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case on appeal: *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134, 135 (1962); *City of Detroit v. Murray Corporation of America*, 355 U.S. 489, 492 (1958); *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 70 (1954); *Dutton v. Evans*, 400 U.S. 74, 77 (1970).

Ordinance No. 2216 of the City of Burbank, held invalid by the United States Court of Appeals as repugnant to the Supremacy Clause, added Section 20-32.1 to the Burbank Municipal Code which provides as follows [R. 371]:

"Sec. 20-32.1. Aircraft Take-Offs.

"(a) Pure Jets Prohibited from Taking Off Between 11:00 P.M. and 7:00 A.M.

"It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the

Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(b) Airport Operator Prohibited from Allowing Take-Offs.

"It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(c) Exception: Emergencies.

"This Section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off."

QUESTIONS PRESENTED.

The questions presented by this appeal are as follows:

(1) Whether the Federal government has so preempted the fields of regulation of the use of air space and the regulation of air traffic so as to invalidate and preclude enforcement of the ordinance (Supremacy Clause, Article VI, Clause 2).

(2) Whether the ordinance is in conflict with Federal statutes or Federal regulations and is rendered void and unenforceable by the Supremacy Clause (Article VI, Clause 2).

(3) Whether enforcement of the ordinance would result in an intolerable and unreasonable burden on interstate commerce in violation of the Commerce Clause (Article I, Section 8, Clause 3).

(4) Whether the ordinance constitutes an attempted regulation of a phase of the national commerce which, because of the need of national uniformity, demands that regulation, if any, be prescribed by a single authority.

All of the above questions were answered in the affirmative by the District Court [318 F.Supp. 914]. The Court of Appeals confined itself to questions (1), (2) and (4) and answered these questions in the affirmative [Appendix A].

In the terms and circumstances of the case the question presented by this appeal is whether the City of Burbank is powerless to restrict departures of pure jet aircraft from Hollywood-Burbank Airport, a *privately* owned and operated airport within its boundaries, between the hours of 11:00 p.m. and 7:00 a.m. under the following circumstances:

(a) To accommodate jet aircraft the private airport proprietor (Lockheed Air Terminal, Inc.) has extended the airport runways to the maximum limits of its property so that aircraft using it must necessarily fly at low altitudes over adjacent residences, with resultant disturbance of the occupants of such residences, particularly during the hours normally devoted to sleep [Pl.Exs. 1, 2, 7 and 30].

(b) The Federal Aviation Administrator has refused to make any determinations as to what would be acceptable noise levels in terms of jet aircraft for particular airport environments and has left such determinations in the hands of individual airport proprietors.¹

¹14 C.F.R. §36.5.

(c) Airport proprietors, without violating any Federal statute or regulation, may exclude any aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.²

(d) The FAA Chief of the Airport Traffic Control Tower at the Hollywood-Burbank Airport has recognized the seriousness of the noise problem in the vicinity of the airport and the steps taken by him to reduce this problem were ineffective [Pl.Ex. 30; R.Tr. 380, 382].

(e) The Federal Aviation Administrator, under similar circumstances, has declared that nondiscriminatory time limitations may be an effective and appropriate means of adapting aircraft noise to the needs of local communities and that such form of locally responsive noise control is clearly in the national interest.³

(f) The only regularly scheduled flight affected by the ordinance was an intrastate flight of an intrastate air carrier (Pacific Southwest Air Lines) departing at 11:30 p.m. each Sunday. The other flights affected were principally departures of corporate jet aircraft [R. 389].

STATEMENT OF THE CASE.

Lockheed Air Terminal, Inc. (hereinafter referred to as "Lockheed"), a Delaware corporation, is the owner and operator of Hollywood-Burbank Airport [R. 368]. The airport is located in a thickly populated area [R. 387] and almost entirely within the City of Burbank [R. 374; Pl.Exs. 1 and 2]. Its "North-South"

²Letter dated June 22, 1968 from the Secretary of Transportation to the Committee on Interstate Commerce contained in Senate Report No. 1353, 90th Cong. 2d Sess. 6-7 (1968).

³*In re Dreflus*, FAA Regulatory Docket No. 9071 (7/10/69).

runway is the preferential runway for take-off (from north to south), not only because of its greater length (approximately 6,900 feet), but also because of its southerly slope and the fact that the prevailing wind is generally from the south [R.Tr. 146-150]. Aircraft taking off to the south over-fly a residential area within the City of Burbank from one-third to one-half mile distant [R.Tr. 405]. Hollywood-Burbank Airport also has an "East-West" runway approximately 6,000 feet in length. Aircraft departing to the east on this runway over-fly a residential area within the City of Burbank somewhat closer than the residential area to the south [Pl.Ex. 30]. Aircraft departing to the west over-fly that portion of the City of Los Angeles known as North Hollywood [Pl.Exs. 1 and 2; R.Tr. 27]. The FAA Departure Charts for Hollywood-Burbank Airport [Pl.Ex. 7] specify minimum climb rates for departing aircraft varying from 260 feet to 347 feet per nautical mile.

None of the runways at Hollywood-Burbank Airport can accommodate the larger jet aircraft, such as the 707 and the DC-8. They are generally sufficient to accommodate the smaller jet aircraft such as the 727, the DC-9 and the 737 [R.Tr. 387-388]. Lockheed achieved the runway lengths indicated by extending these runways to the limits of the property which it owns or controls [Pl.Exs. 1 and 2].

The problem with respect to noise created by aircraft taking off or landing at Hollywood-Burbank Airport dates from about 1965 when jet aircraft began using the airport on a regular basis [R.Tr. 126-127]. The first official recognition of the adverse environmental effects of this jet aircraft traffic was in the latter part of 1967 when the FAA Chief of the Airport

Traffic Control Tower at the airport established non-mandatory procedures for take-offs and landings in an attempt to reduce noise complaints [Pl.Ex. 30]. These procedures were modified several times, the last of which (dated September 4, 1969) provided, on a non-mandatory basis, that Runway 25 (take-offs to the west on the "East-West" runway) should be used as much as possible for departures of turbine powered aircraft during the period from 2300 to 0700 when people are asleep [Pl.Ex. 30]. The only discernible effect of this procedure was an increase in complaints by people living west of the airport [R.Tr. 380]. The number of complaints from south of the airport remained about the same [R.Tr. 382].

On March 31, 1970, the City Council of the City of Burbank duly and regularly adopted Ordinance No. 2216 which added Section 20-32.1 to the Burbank Municipal Code to provide as set forth above. It became effective on May 4, 1970. [R. 371].

Hollywood-Burbank Airport is used by United Air Lines, Western, Air West and Pacific Southwest Air Lines, and now possibly by Continental Air Lines, as an alternate to Los Angeles International Airport (LAX) when landing there is precluded by weather conditions [R.Tr. 167, 183].

United Air Lines, Western, Air West, Continental Air Lines and Pacific Southwest Air Lines also utilize Hollywood-Burbank Airport for regularly scheduled flights. The only regularly scheduled flight affected by the ordinance was an intrastate flight of Pacific Southwest Air Lines (an intrastate air carrier) originating in Oakland, California and departing from Hollywood-Burbank Airport at 11:30 p.m. each Sunday night for San Diego [R.Tr. 167, 183; R. 389].

The only other flights affected by the ordinance were principally departures (at least three per week) of corporate jet aircraft [R. 389].

THE QUESTIONS ARE SUBSTANTIAL.

The questions presented by this appeal are substantial and urgently need this Court's consideration. The following is submitted in support of this statement:

1. Noise Pollution.

In terms of destruction of our environment noise pollution ranks with air and water pollution.⁴ Noise caused by jet aircraft and its effects are well documented in definitive works on this subject.⁵ The intensity and effect of noise pollution resulting from operations at Hollywood-Burbank Airport and other airports in the Los Angeles area, and the prospects for the future, have been the subject of a specific study.⁶ The future is bleak. Jet aircraft in current use have many years of useful life.⁷ The Federal Aviation Administration has procrastinated in imposing retrofit re-

⁴Panel on Noise Abatement, Dept. of Commerce, *The Noise Around Us* 2 (1970).

⁵Hildebrand, *Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research*, 70 Colum. L.Rev. 652; Wyle Laboratories Research Staff, *Supporting Information for the Adopted Noise Regulations—Final Report to the Department of Aeronautics* (Report No. WCR 70-3 (R)), 1971; California Department of Public Health, *A Report to the 1971 Legislature on the Subject of Noise Pursuant to Assembly Concurrent Resolution 165, 1970* (1971).

⁶Branch and Beland, *Outdoor Noise and the Metropolitan Environment—Case Study of Los Angeles with Special Reference to Aircraft, 1970* (Library of Congress Catalog Card No. 72-126027).

⁷Reporter's Transcript, pp. 317-20.

quirements on these aircraft.⁸ Even retrofitting will provide little relief.⁹ Noise standards imposed by the Federal Aviation Administration on new subsonic aircraft are inadequate.¹⁰

2. Attempts to Provide Some Relief.

Communities faced with the destruction of their environment by aircraft taking off and landing at airports outside their boundaries have attempted to provide some relief to their residents through legislation requiring aircraft to fly at a height which would lessen the noise impact. In every case where this has been attempted, the lower Federal courts have held the legislation to be invalid.¹¹ Prior to this case no Federal Court had decided the question whether a municipality could, for the same purpose, impose reasonable restrictions on an airport located within its boundaries, and no Federal Court of Appeals had squarely held that Congress has preempted the field of regulation and control of aircraft noise.¹² In contrast to the conclusion

⁸It was not until October 30, 1970 that the FAA issued an Advance Notice of Proposed Rulemaking concerning "civil airplane noise reduction retrofit requirements" (35 Fed.Reg. 16980). Nothing, as yet, has resulted from this.

⁹Reporter's Transcript, pp. 313-14.

¹⁰Berger, *Nobody Loves an Airport*, 43 So.Cal.L.R. 631, 770-74 (1970).

¹¹*American Airlines, Inc. v. Hempstead*, 272 F.Supp. 226 (E.D.N.Y. 1967), *aff'd* 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969); *Allegheny Airlines, Inc. v. Cedarhurst*, 238 F.2d 812 (2d Cir. 1956); *American Airlines Inc. v. Audubon Park*, 297 F.Supp. 207 (W.D.Ky. 1968), *aff'd per curiam*, 407 F.2d 1306 (6th Cir. 1969), *cert. denied*, 396 U.S. 845 (1969).

¹²In *American Airlines, Inc. v. Hempstead*, *supra*, the Court of Appeals stated, 398 F.2d 369, at p. 376 (footnote 4): "But the problem arises that it is this particular noise ordinance in this particular setting which is found to regulate flight paths and procedures; another noise ordinance might not have that effect." (Italics added)

reached by the Court of Appeals in this case, a California Court of Appeal, in *Stagg v. Municipal Court of Santa Monica Judicial District*,¹³ held that Congress has not preempted this area of regulation and sustained an ordinance of the City of Santa Monica almost identical with the Burbank ordinance. A lower court of New Jersey reached the same conclusion and enjoined jet aircraft operations in or out of the Morristown Airport between 9:00 p.m. and 7:00 a.m. Monday through Saturday and on Sundays, other than between the hours of 1:00 p.m. and 3:00 p.m.¹⁴ Notwithstanding the adverse climate created by the Federal lower court decisions, States and local governments continue in their attempts to provide some relief from

¹³2 Cal.App.3d 318, 82 Cal.Rptr. 578 (1969).

¹⁴*Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 Atl.Rptr.2d 692 (1969). In so holding the Court stated in part as follows (261 Atl.Rptr. 692, at pp. 701, 706):

"At Morristown Airport the offensive engine noises for the most part are not emitted by airplanes serving the general public, but by the jets of the few corporate executives who own or charter the aircraft which noisily ride the invisible highway as an industrial status symbol. (See: *Harley, Jr., TC, CCH Dec. 29, 803 [M], ¶7703 [M] [1969]*). If not simply a symbol it is argued that time and energy of the corporate officer and employee is saved. The importance of the speed of travel to the corporate executive must be placed on one side of the scale and balanced against the domestic tranquility to which family and the neighborhood are entitled."

• • •

"Most intrusive is the noise from corporate jets. If these are truly used for business, why should not the hours of landing and take-off be limited to normal, reasonable business hours? The corporate executive's desire for early departure and late returns may have to be sacrificed in the interest of a good night's rest for the residents. He may have to leave a day earlier or return a day later. His absence for a few hours more or less will not send his corporation into bankruptcy."

the adverse effects of jet aircraft noise.¹⁵ No doubt this will continue until this Court finally decides the question.

3. Relief Through Legislative Action at the Federal Level.

The demands of citizens for relief from noise pollution and other activities which destroy the environment in which they live have to a degree filtered through to their elected representatives in Washington. As a result we now have the National Environmental Policy Act,¹⁶ the Environmental Education Act,¹⁷ the Air

¹⁵On November 6, 1970 the *City of Inglewood, California* (adjacent to the Los Angeles International Airport) added Sections 4620 and 4620.1 to its Municipal Code which impose noise limitations on aircraft which fly below the minimum altitudes of flight prescribed by the FAA for landings and take-offs. These sections were promptly challenged by the Air Transport Association of America and others in the United States District Court for the Central District of California (No. 71-1153-CC), which issued a temporary restraining order and a preliminary injunction, and later by the United States (Federal Aviation Administration) in a separate action (No. 71-1632-CC). These cases have not as yet been tried; in 1969 *California* adopted legislation (Sections 21669-21669.5, Public Utilities Code) which required the Department of Aeronautics of the State of California to adopt noise standards governing the operation of aircraft and aircraft engines for airports operating under a valid permit issued by the Department, to an extent not prohibited by Federal law (while the noise standards have been promulgated their effective date has been postponed until December 1, 1972); the *Town of Hempstead, New York* is supporting a bill introduced in the New York legislature which would ban flights from metropolitan airports between midnight and 6:00 a.m.; the legislature of the State of *Massachusetts* has considered placing into effect a statute which would prohibit commercial supersonic transport planes not capable of limiting their noise level to 108 decibels or less from landing or taking off in that state (This proposed legislation was considered in the *Opinion of the Justices of the Supreme Judicial Court of Massachusetts* (1971), 271 N.E.2d 354).

¹⁶42 U.S.C. §4321 *et seq.*

¹⁷20 U.S.C. §1531 *et seq.*

Quality Act of 1967¹⁸ and the Environment Quality Improvement Act of 1970.¹⁹ The difficulty with these legislative acts is that they provide no present relief from existing noise pollution. Even with respect to new projects which may have an adverse effect on the environment, it has been necessary for this Court²⁰ and other courts²¹ to compel the Federal agencies concerned to give proper consideration to the environmental impact of proposed actions in accordance with the provisions of the applicable statute. This Court has, without the benefit of specific legislation by Congress, intervened to protect the environment.²²

4. Posture of the Federal Aviation Administration.

Appellees took the position before the Court of Appeals that the Federal Aviation Administrator has had the power, at least since 1958, to directly deal with jet aircraft noise, and that the addition in 1968 of Section 611 (49 U.S.C. §1431) to the Federal Aviation Act of 1958 merely buttressed his authority.²³ However, it was not until November of 1969 that any-

¹⁸42 U.S.C. §1857 *et seq.*

¹⁹42 U.S.C. §§4371-4374. In this Act it is declared that "The primary responsibility for implementing this policy rests with State and local governments" (Section 202(b)(2)); 42 U.S.C. §4371(b)(2)).

²⁰*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

²¹*Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F.2d 1109 (D.C.Cir. 1971). There the Court stated (at p. 1111):

"Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."

²²*New Jersey v. New York*, 283 U.S. 336 (1931); *Udall v. Federal Power Commission*, 387 U.S. 428 (1967).

²³Brief of the Appellees, pp. 18-19, citing 49 U.S.C. §1348(c).

thing was attempted by the Federal Aviation Administration to regulate the noise at its source. At that time the Federal Aviation Administration adopted regulations prescribing noise standards for all new subsonic turbojet-powered aircraft.²⁴ At this time it is considering regulations concerning civil airplane noise reduction retrofit requirements.²⁵ It is worthy of note that at every opportunity the Federal Aviation Administration expressly disclaims that the noise standards which it adopts are acceptable in any specific airport environment and following its previous pattern declares that airport owners acting as proprietors can deny the use of their airports to aircraft on the basis of noise considerations.²⁶ The net result is that airport proprietors are *not* regulated in terms of the permissible level of noise which may be created by aircraft using their airports. This attitude and approach by the Federal Aviation Administration allows the Federal government to remain immune from liability for aircraft noise under *Griggs v. Allegheny County*.²⁷ It also permits the Federal Aviation Administration to parry the thrust of citizens' complaints by pointing to the airport proprietor as the culprit. As a result we have the "lacuna" about which the California Supreme Court warned in *Loma Portal Civic Club v. American Airlines, Inc.*²⁸ If the decision in this case stands, the last door

²⁴14 C.F.R. §36 *et seq.*

²⁵35 Fed. Reg. 16980.

²⁶Letter dated June 22, 1968 from the Secretary of Transportation to the Committee on Interstate Commerce contained in Senate Report No. 1353, 90th Cong. 2d Sess. 6-7 (1968); *In re Dreifus*, FAA Regulatory Docket No. 9071 (7/10/69); 14 C.F.R. §36.5.

²⁷369 U.S. 84 (1962).

²⁸61 Cal.2d 582, 39 Cal.Rptr. 708, 394 P.2d 548, at p. 554 (1964).

is closed on any attempt to fill the hiatus created by the posture of the Federal Aviation Administration.²⁹

5. *Griggs v. Allegheny County.*

To some legal writers the decision of this Court in *Griggs v. Allegheny County*³⁰ was unfortunate. They claim that had the dissent prevailed so that the Federal government would be liable for the "taking" of air or noise easements, meaningful relief would have long since been provided for those who have the misfortune of residing in the vicinity of airports.³¹ In any event if Congress has in fact preempted the field of regulation of noise created by jet aircraft to the exclusion of States and local governments, as the opinion of the Court of Appeals in this case so holds, then the decision in *Griggs* must be reconsidered, something only this Court

²⁹One commentator has described the situation in this fashion:

"The FAA has attempted to play both ends against the middle—with the private citizens winding up in the middle. It piously states that no complete answer can come from the federal government and that local regulation is both necessary and desirable. At the same time, it accepts with open arms the court determinations that any action to relieve the noise nuisance of aircraft must come from the federal government, i.e. the FAA, and impedes action by municipalities which goes beyond programs of 'compatible land use.' It seems to be going out of its way to limit local regulation while providing little in the way of a national solution; and this serves only the interest of one segment of the public—the industry it was set up to regulate." Berger, *Nobody Loves an Airport*, 43 So. Cal. L.R. 631, at p. 724 (1970).

³⁰369 U.S. 84 (1962). In this case the Court held that the airport proprietor, not the Federal government or the airlines, was liable for the "taking" of air or noise easements necessary for the airport's operations.

³¹Lesser, *The Aircraft Noise Problem: Federal Power but Local Liability*, 3 Urban Lawyer 175, at p. 202 (1971); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 Sup. Ct. Rev. 63.

can do. With power should go responsibility. If the decision in this case is allowed to stand without reversal of *Griggs*, then the Federal Aviation Administration will be able to continue its questionable course of conduct without interference, and the Federal government and the airlines will remain shielded from liability for their actions or non-action.

6. *Huron Portland Cement Co. v. Detroit.*

In *Huron Portland Cement Co. v. Detroit*,³³ a decision handed down by this Court in 1960, the power of a municipality to relieve its residents from some of the adverse effects of air pollution was sustained. Had this decision been followed by the lower Federal courts and expanded to include noise and other types of pollution, this nation, through action taken by State and local governments, would have been far along the road of alleviating their adverse effects. Instead the lower Federal courts have taken great pains to rob this decision of any vitality, as has been done in this case, and have thrust it aside as not being germane in cases dealing with noise pollution caused by jet aircraft.³⁴ In contrast, state courts have relied on this decision in reaching opposite results.³⁴ The issues in this case are of far greater importance than those considered by this Court in *Huron*.

³³362 U.S. 440 (1960).

³⁴*American Airlines, Inc. v. Town of Hempstead*, 272 F.Supp. 226 (E.D.N.Y. 1967); *American Airlines, Inc. v. Town of Hempstead*, 398 F.2d 369 (2d Cir. 1968). See also *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971). Compare *Head v. Board of Examiners*, 374 U.S. 424, at pp. 428-429 (1963).

³⁴*Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 Alt.Rptr.2d 692 (1969). See also *Loma Portal Civic Club v. American Airlines, Inc.*, 61 Cal.2d 582, 39 Cal. Rptr. 708, 394 P.2d 548, at p. 555 (1964).

7. Preemption.

The last occasion this Court has taken to consider the Federal Aviation Act of 1958 (49 U.S.C. §1301, *et seq.*) in terms of preemption was in the case of *Colorado Anti-Discrimination Com. v. Continental Air Lines, Inc.*³⁶ There with reference to the Colorado Anti-Discrimination Act, this Court held that Congress had not preempted this particular area of regulation. Prior to that time, in 1954, this Court considered the Civil Aeronautics Act of 1938, the predecessor to the Federal Aviation Act of 1958, in *Braniff Airways v. Nebraska State Board*.³⁷ In reaching its decision that there was no Federal preemption, this Court, in support of that determination, noted the adoption by States of the uniform Aeronautics Act which, among other things, provided for regulation of airports. Neither the District Court nor the Court of Appeals in this case gave any weight to these decisions nor to the decision in *Head v. Board of Examiners*.³⁸ What the decision in this case amounts to is a declaration, as a *matter of law* and no matter what the circumstances may be, that States and local governments have no power to enact any regulations relating to airport proprietors. The justification for this conclusion is that "they *might conceivably* be over-protective of one of the multiple values and upset the delicate balance struck by the FAA under the aegis of federal law"³⁹ (*italics added*). This in spite of the fact that airport proprietors may deny the use of their airports to aircraft on the basis of

³⁶372 U.S. 714 (1963).

³⁷347 U.S. 590 (1954).

³⁸374 U.S. 424 (1963).

³⁹Appendix A, Page 11.

noise considerations³⁹ and thus can do the very thing which the Court claims might upset the delicate balance struck by the FAA. This Court, in *Rice v. Board of Trade*,⁴⁰ held that within the zone where a Federally regulated enterprise has freedom to act, a State may impose reasonable regulations.⁴¹

8. Conflict.

In reaching its conclusion that the Burbank ordinance was in conflict with Federal rules and regulations, the Court of Appeals relied exclusively on *Perez v. Campbell*,⁴² a case not even remotely related to what could be considered a statute enacted to protect health or safety. The conflict which it found was with respect to a *non-mandatory* runway preference order of a minor FAA official in charge of the air traffic control tower at Hollywood-Burbank Airport,⁴³ a regulation which admittedly contributed little, if anything, toward providing relief for persons residing in the vicinity of that airport.⁴⁴ In contrast to this, the Federal Aviation Administrator had previously declared, in a situation where runway preference orders and other regulations locally imposed by the FAA representative had not

³⁹*Supra*, note 26.

⁴⁰331 U.S. 247 (1947).

⁴¹331 U.S. 247, at p. 254.

⁴²402 U.S. 637 (1971).

⁴³Appendix A, p. 14. It is difficult to understand how the Court could conclude that this non-mandatory order represented a considered determination by the FAA that any further steps to reduce noise would be beneath "the lowest practicable minimum," in view of the fact that the FAA has refused to make any determination as to the acceptability of prescribed noise levels in any specific airport environment (14 C.F.R. §36.5) and airport proprietors can exclude any aircraft on the basis of noise considerations (see note 26, *supra*).

⁴⁴Reporter's Transcript, pp. 380, 382.

provided needed relief, that time restrictions similar to those imposed by the City of Burbank would be "an effective and appropriate means of adapting aircraft noise to the needs of the local communities" and would be "clearly in the national interest."⁴⁵ While acceding to this proposition where time restrictions are imposed by an airport proprietor, the Court of Appeals held that such restrictions could not be imposed by States or local governments, citing an advisory opinion of the Justices of the Supreme Judicial Court of Massachusetts who, although expressing serious doubt that they could, refused to decide the issue.⁴⁶

9. Burden on Interstate Commerce.

Although the Court of Appeals declined to consider the issue as to whether the Burbank ordinance constituted an unreasonable burden on interstate commerce, the District Court concluded that it did. This conclusion was reached, not because the ordinance did in fact burden interstate commerce, since it only affected one regularly scheduled intrastate flight⁴⁷ and flights of corporate jet aircraft, but rather on the basis that the ordinance had to be viewed as if it were

⁴⁵*In re Dreifus*, FAA Regulatory Docket No. 9071 (7/10/69).

⁴⁶*Opinion of the Justices of the Supreme Judicial Court of Massachusetts*, 271 N.E.2d 354 (1971). The FAA has consistently taken the position that while airport proprietors can deny the use of their airports to aircraft on the basis of noise consideration, States and local governments "may not use their police power to regulate in any way the flight of aircraft for noise purposes." The FAA justifies the time restrictions which it has placed on the Washington National Airport on the ground that it "is the proprietor of that airport" (*In re Dreifus*, *supra*, note 45; see also 14 C.F.R. §36.5 and letter dated June 22, 1968 from Secretary of Transportation, *supra*, note 2).

⁴⁷PSA has since changed the time of departure of its Sunday night flight to San Diego from 11:30 p.m. to 10:50 p.m.

adopted by all major airports within the United States. A similar argument was advanced in the recent case of *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*,⁴⁸ and found wanting.

10. Violation of Fifth, Ninth and Tenth Amendment Rights.

One of the points which Appellants stressed in their argument before the Court of Appeals was that a holding that Burbank is powerless to enact and enforce the ordinance in question would allow private airport proprietors, such as Lockheed, to ride roughshod over the rights of owners of property surrounding airports in violation of constitutional guarantees.⁴⁹ This is exactly what has occurred and is occurring since the District Court's decision. If the activities and conduct of the Federal Aviation Administration and the United States in connection with the Hollywood-Burbank Airport are sufficient to constitute Federal action,⁵⁰ then the Fifth Amendment would apply. An action for dam-

⁴⁸40 U.S. Law Week 4391, at pp. 4395-96 (1972); 31 L.Ed. 2d 620, 631-632 (1972).

⁴⁹Brief of the Appellants, p. 40.

⁵⁰Approximately 2,050 feet of the northernmost portion of the "North-South" runway and approximately 2,250 feet of the westernmost portion of the "East-West" runway are on land owned by the United States Government [R. 374-75]; the FAA has expended approximately \$2,000,000 on the installation of navigational aids at Hollywood-Burbank Airport including the Instrument Landing System ("ILS"), runway approach and identification lights, and radar and radio equipment, and operates the Airport Traffic Control Tower and Radar Approach and Departure Control at that airport [R. 379]; the FAA has included Hollywood-Burbank Airport in the National Airport Plan [Pl. Ex.56] in spite of the fact that Congress had specifically directed that such Plan was to embrace airports owned and operated by States and local public agencies (49 U.S.C. §1101, §1102).

ages or in inverse condemnation can hardly be considered a substitute for that portion of the Fifth Amendment which guarantees that "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." Those who live in the vicinity of Hollywood-Burbank Airport are daily being deprived of a chance to enjoy a life free from constant bombardment by sound waves. Their liberty and the use of their property are severely restricted by the adverse environment imposed on them by a private corporation for private gain and without just compensation having been paid.⁵¹ Surely this is an area in which a municipality or a State may reasonably legislate, as they have in the area of life, liberty or property taken by direct physical force. The Commerce Clause cannot shield those who invade Fifth Amendment rights, and legislation, such as the Burbank ordinance, which seeks in some degree to preserve such rights until due process is satisfied and just compensation paid, must be upheld if that Amendment is to have any real meaning.⁵²

⁵¹The California Supreme Court has recently recognized that more is involved than the mere "taking" of property, in holding that an action grounded on public nuisance will lie. See *Nestle v. City of Santa Monica*, 6 Cal.3d 920, 101 Cal.Rptr. 568, 496 P.2d 480 (1972).

⁵²In *Bell v. Burson*, 402 U.S. 535 (1971), this Court held that before a person's driving privileges could be terminated because of involvement in an accident, the Due Process Clause of the Fourteenth Amendment requires that a hearing be provided for the determination of whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident.

(This footnote is continued on next page)

If the Fifth Amendment is not applicable, there is a respectable body of opinion that the right to a decent environment is one of the rights retained by the people under the Ninth and Tenth Amendments, and that action which leads to the destruction of the environment may be restrained or limited.²² Apart from this, it would appear to be beyond question that one of the rights retained by the people under the Ninth and Tenth Amendments was the right to restrain private persons and corporations who would seek to interfere with their lives and liberty or take their property without first paying just compensation. Under either of these propositions the Burbank ordinance is such a restraint, having been enacted by a legislative body duly elected by the People of the City of Burbank.

CONCLUSION.

Accordingly, it is respectfully submitted that the questions involved in this case are of paramount public importance. They transcend the factual situation here presented. Unless this Court acts, the intolerable situation now existing as a result of noise pollution caused by jet aircraft can only become worse. Though they

(402 U.S. 535, at pp. 542-43). It is a logical extension of this decision that *before* a person may be deprived of the use and enjoyment of his property, just compensation must be paid or, at the very least, deposited in court.

²²Roberts, *An Environmental Lawyer Urges: Plead The Ninth Amendment*, *Natural History*, 26 (Aug.-Sept. 1970); Redlich, *Are There Certain Rights . . . Retained by the People?* 37 N.Y.U. L. Rev. 786 (1962); Beckman, *The Right to a Decent Environment Under the Ninth Amendment*, 46 Los Angeles Bar Bulletin 415 (Sept. 1971). See also *Grainwold v. Connecticut*, 381 U.S. 479 (1965).

soar into a different realm,²⁴ the impact of jet aircraft on earth-bound lives and property is very real and substantial.

SAMUEL GORLICK,

City Attorney,

RICHARD L. SIEG, JR.,

Assistant City Attorney,

Counsel for all Appellants except Samuel Gorlick,

RICHARD L. SIEG, JR.,

Counsel for Appellant Samuel Gorlick.

²⁴*Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 107 (1948).

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Lockheed Air Terminal, Inc., a corporation, and Pacific Southwest Air Lines, a corporation, *Plaintiffs-Appellees*, Air Transport Association of America, *Plaintiff-Appellee*, vs. The City of Burbank, a municipal corporation; Dr. Jarvey Gilbert, Mayor; Robert R. McKenzie, Vice Mayor; Councilman George W. Haven; Councilman Robert A. Swanson; Councilman D. Vernon Gibson; Joseph N. Baker, City Manager; Samuel Gorlick, City Attorney for the City of Burbank, and Rex R. Andrews, Chief of Police of the City of Burbank, *Defendants-Appellants*. No. 71-1242.

[March 22, 1972].

Appeal from the United States District Court for the Central District of California.

Before: BROWNING, DUNIWAY and TRASK, Circuit Judges, TRASK, Circuit Judge:

Hollywood-Burbank Airport (H-B Airport) is owned and operated by Lockheed Air Terminal, Inc. (Lockheed). It occupies approximately 535 acres, of which 128 acres (including portions of each of its two runways) are owned by the Federal Government. As a satellite airport for Los Angeles International Airport, it is included in the National Airport Plan promulgated by the Administrator of the Federal Aviation Administration (FAA) pursuant to the Federal Air-

port Act of 1946, 49 U.S.C. § 1101 *et seq.*¹ As such, it is used by United Air Lines, Western Airline, Air West and Pacific Southwest Airlines (PSA) as an alternative to Los Angeles International Airport when weather conditions at the latter prevent its use. Those airlines, together with Continental Air Lines, also use H-B Airport for regularly scheduled flights.

United, Western, Air West and Continental are interstate carriers and hold Certificates of Public Convenience and Necessity issued by the Civil Aeronautics Board (CAB). PSA is an intrastate carrier and holds a Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission.

H-B Airport is located in a thickly populated area, and is entirely within the City of Burbank except 2,050 feet of the northernmost portion of its north-south runway, which lies in the City of Los Angeles. The north-south runway is the longer and preferred for take-offs. The east-west runway is better equipped with navigation guides for landing under minimum weather conditions. Both runways lead over residential districts in both directions.

In an effort to deal with the adverse environmental effects of jet aircraft at H-B Airport, specifically the problem of noise, the FAA Chief of the Airport Traffic

¹"Private airports which meet the above criteria may be included in the NAP if they are now and will continue to be open to the public, if the facilities are adequate or may be expanded to meet recommended development needs, and if a more desirable location is not evident. Certain high-activity, privately owned airports are also included if a Federal interest has been expressed through provision of facilities such as an air traffic control tower, even though these airports do not necessarily meet the expansibility criteria. Acquisition of such fields by an eligible public body is encouraged wherever possible." 1968 National Airport Plan at 14.

Control Tower at the airport issued a series of runway preference orders. The last one, BUR 7100.5B, issued September 4, 1969, provided that, traffic and weather permitting, the east-west runway (landing from the east, taking off to the west) should be used as much as possible for departures of turbine powered aircraft between 11:00 p.m. of one day and 7:00 a.m. of the next.² Aircraft departing to the west overfly that portion of the City of Los Angeles known as North Hollywood.

²1. **PURPOSE.** This Order prescribes procedures to be followed by Burbank Tower personnel in application of noise abatement procedures. * * *

4. **BACKGROUND.** The problem of noise in the vicinity of the Hollywood-Burbank Airport has become increasingly serious. More noise complaints are being received. Threats of legal action to be taken to obtain relief from noise are being heard. We need to do everything practicable and within reason to reduce the noise exposure to residents living near the airport. The workload caused in handling and following-up on noise complaints has increased to the point where it occupies a major portion of the administrative workload of the facility. Procedures established for the Hollywood-Burbank airport are designed to reduce the community exposure to noise to the lowest practicable minimum. The procedures are not mandatory on the part of the pilots, however, traffic controllers must be noise abatement conscious and emphasize noise abatement in order to obtain the highest degree of voluntary cooperation from pilots. The area within a 5-mile radius of the Hollywood-Burbank Airport is considered to be a noise-sensitive area.

5. **PROCEDURES.** The following procedures apply to large (over 12,500 pounds) aircraft and all turbine powered aircraft:

"a. Normally do not assign runway 7 for departures, or runway 25 for arrivals [east-west runway].

"b. Traffic and weather permitting, make every effort to use runway 7 for arrivals of turbine powered aircraft.

"c. Traffic and weather permitting, use runway 25 for departure of turbine powered aircraft as much as possible during period from approximately 2300 to 0700 local time when people are asleep (residential area is less dense and further from end of runway west of 25 than south of 15).

* * *

(This footnote is continued on next page)

On March 31, 1970, the City Council of Burbank, in response to continuing complaints about noise from the airport, passed Ordinance No. 2216, which added Section 20-32.1 to the Burbank Municipal Code.³ That ordinance, which took effect May 4, 1970, prohibited pure jet aircraft from taking off from H-B Airport between 11:00 p.m. of one day and 7:00 a.m. of the next day, and made it unlawful for the operator of the airport to allow such planes to take off at such times. Exception was made for emergency flights where the City Police Department was contacted and the Watch Commander on duty approved. The express purpose of this ordinance was to abate the serious environmental problem caused by the taking off of pure jet aircraft during sleeping hours.

One regularly scheduled flight was affected by the ordinance—an intrastate flight of PSA which origi-

"c. In the event a pilot requests departure on runway 7 or landing on runway 25, honor the request, traffic permitting, but inform the pilot that the runway is 'noise sensitive.' (Residential area closest east of airport.)

"f. These procedures are not intended to incur delays to aircraft or hamper the controller in handling airport traffic. If the traffic situation existing at the time requires the use of runways contrary to these procedures, controllers may deviate from the procedure. *Controllers are expected to use good judgment in making this determination.*"

"(a) Pure Jets Prohibited from Taking off Between 11:00 P.M. and 7:00 A.M.

"It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(b) Airport Operator Prohibited from Allowing Take-Offs.

"It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(c) Exception: Emergencies.

"This section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off."

ated in Oakland and departed from Burbank for San Diego at 11:30 p.m. each Sunday night. The other flights affected were principally departures of corporate jet aircraft.

Lockheed and PSA brought suit in the United States District Court for the Central District of California on May 14, 1970, against the City of Burbank and certain of its officers, seeking declaratory and injunctive relief on the ground that the Burbank ordinance is unconstitutional. Air Transport Association of America, an unincorporated association of scheduled interstate air carriers, was permitted to file a complaint in intervention.

The district court assumed jurisdiction over the case under 28 U.S.C. §§ 1331(a) and 1337, and trial of the action was held in September 1970. On November 30, the district court's findings of fact, conclusions of law and judgment were signed and filed. That judgment declared the Burbank ordinance unconstitutional, illegal and void, and enjoined its enforcement. The court held that the ordinance violated the Supremacy Clause, U.S. Const. art. VI, cl. 2, and the Commerce Clause, U.S. Const. art. I, §8, cl. 3. *Lockheed Air Terminal, Inc. v. Burbank*, 318 F. Supp. 914 (C.D. Cal. 1970).

This appeal was taken from that final judgment pursuant to 28 U.S.C. § 1291, and is properly before us. In deciding this case, we limit ourselves to the issue whether the municipal ordinance is unconstitutional under the Supremacy Clause, as that determination is dispositive of the appeal.

The Supremacy Clause states that the Constitution, federal laws "made in Pursuance thereof . . .," and treaties "made under the Authority of the United States,

shall be the supreme Law of the Land. . . ." U.S. Const. art. VI, cl. 2. It establishes as a principle of our federalism that state and local laws are not enforceable if they impinge upon an exclusive federal domain. This impermissible impingement is diversely described as "preemption" and "conflict." The application of those terms means that the state or local government has attempted to exercise power which it does not possess because of an express or implied denial of that authority in the Constitution, valid federal laws and regulations promulgated thereunder, or valid treaties. See *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971). Compare *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), with *Perez v. Campbell*, 402 U.S. 637 (1971).

The Preemption Issue

In this case appellees (and FAA in its amicus curiae brief) contend that the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*, operates to deny Burbank the power to enact the ordinance in question. There is no doubt that the Act creates a comprehensive federal scheme to deal with air commerce, under the administrative auspices of the FAA and CAB. Section 1508 declares that the United States possesses and exercises complete and exclusive national sovereignty in the navigable airspace over the country, and section 1304 grants to the citizens of the United States a public right of freedom of transit in this navigable airspace. The CAB issues Certificates of Public Convenience and Necessity to air carriers, without which they cannot engage in air transportation, 49 U.S.C. § 1371, and the FAA Administrator has power to prescribe air traf-

to make rules and develop plans and policy for the use of the navigable airspace, 49 U.S.C. § 1348. He also issues airman, aircraft, air carrier and airport operating certificates, 49 U.S.C. §§ 1422-24, 1432. Under section 1353, the Administrator of the FAA is directed to make "long range plans . . . and formulate policy . . ." for the use of the navigable airspace and the development of air navigation facilities, including airports. If an airport is built or materially altered, the Administrator must be notified, even though no federal funds are involved. 49 U.S.C. § 1350.⁴ Section 1431, which was added to the Federal Aviation Act in July 1968, specifically provides for responsibility of the FAA Administrator with respect to ecological and environmental problems:

"(a) In order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, the Administrator of the Federal Aviation Administration . . . shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom. . . ."

Appellants (and the State of California as *amicus curiae*) argue that they are not precluded by the Federal Aviation Act from enacting the ordinance in question as an exercise of their police power, based on the legislative history of 49 U.S.C. § 1431, and the prin-

⁴"In order to assure conformity to plans and policies for, and allocations of, airspace by the Administrator under section 1348 of this title, no airport or landing area not involving expenditure of Federal funds shall be established, or constructed, or any runway layout substantially altered unless reasonable prior notice thereof is given the Administrator, pursuant to regulations prescribed by him, so that he may advise as to the effects of such construction on the use of airspace by aircraft."

ciple of State and local responsibility enunciated in the Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371 *et seq.*

Whether a federal statute preempts the otherwise lawful authority of a State or local government to regulate in a specific area is a question of Congressional intent. "[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Therefore, if Congress expressly declares that the authority conferred by it shall be singularly federal, the States may not exercise concomitant or supplementary power over the identical activity. *Campbell v. Hussey*, 368 U.S. 297 (1961); *Rice v. Santa Fe Elevator Corp.*, *supra*. Even when Congress has failed to speak expressly to the issue of federal exclusivity, intention to create sole federal authority can be implied. Key factors in this determination include: (1) the pervasiveness of the federal regulation, *Rice v. Santa Fe Elevator Corp.*, *supra*; (2) dominance of the federal interest in the field of regulation, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143-44 (1963); *Rice v. Santa Fe Elevator Corp.*, *supra*; and (3) the objectives of the federal regulation and whether non-federal regulation obstructs the full execution of those aims, *Perez v. Campbell*, 402 U.S. 637, 649 (1971); *Rice v. Santa Fe Elevator Corp.*, *supra*.

The pervasiveness of federal regulation in the field of air commerce, the intensity of the national interest in this regulation, and the nature of air commerce itself require the conclusion that State and local regulation in that area has been preempted.

The overall design of Congress in enacting the Federal Aviation Act of 1958 was to centralize in a single authority the power to establish rules and regulations for the sole and efficient use of the nation's airspace. *Air Line Pilots Ass'n, Int'l v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960). This purpose is reflected in 49 U.S.C. § 1303, which lists those matters to be considered by the Administrator of the FAA in the exercise of his powers and the performance of his duties under the Act:

"(a) The regulation of air commerce in such a manner as to best promote its development and safety and fulfill the requirements of national defense;

"(b) The promotion, encouragement, and development of civil aeronautics;

"(c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both;

"(d) The consolidation of research and development with respect to air navigation facilities, as well as the installation and operation thereof;

"(e) The development and operation of a common system of air traffic control and navigation for both military and civil aircraft."

Those interests were supplemented in 1968 by the addition of 49 U.S.C. § 1431, which provides:

"(a) [T]he Administrator of the Federal Aviation Administration . . . shall prescribe and amend such rules and regulations as he may find neces-

sary to provide for the control and abatement of aircraft noise. . . .

"(b) In prescribing and amending standards, rules and regulations under this section, the Administrator shall—

....
"(3) consider whether any proposed standard, rule or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest. . . ."

Pursuant to this statutory scheme, the Administrator of the FAA must balance considerations of safety, efficiency, technological progress, common defense and environmental protection in the process of formulating rules and regulations with respect to the use of the nation's airspace. There is no single objective to which he must address himself, but a complex of goals which may individually lobby for inconsistent results in a given circumstance. Congress has vested the federal agency with the responsibility and concomitant authority to resolve the proper balance among the multiple purposes. If State and local governments were to be allowed to exercise supplementary power in this area, they might conceivably be overprotective of one of the multiple values and upset the delicate balance struck by the FAA under the aegis of federal law.

The case of *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), vigorously cited by appellants in support of their position, is distinguishable on the basis of this analysis. There, Detroit was allowed to apply its Smoke Abatement Code to a vessel which had federally inspected and approved boilers. The Court found that the purpose of the federal inspection

laws was "clearly limited to affording protection from the perils of maritime navigation." *Id.* at 445. On the other hand, the purpose of the city regulation was the control of air pollution for the health and welfare of its inhabitants. *Id.* at 442. Since these purposes were not conflicting and there was no overlap of scope between them, there was no preemption. The federal regulation was solely concerned with safety and not environmental quality, and there was no argument that boilers which complied with the Detroit code might be less safe and, therefore, compromise the federal objective.⁸

Appellants argue that the legislative history of 49 U.S.C. § 1431 manifests Congress' intention to allow Burbank to regulate as it has. Our attention is directed to that portion of Senate Report No. 1353, 90th Cong., 2d Sess. 6-7 (1968), which quotes with approval from a letter of June 22, 1968, from the Secretary of Transportation to the Committee on Interstate and Foreign Commerce:

"The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines v. Town of Hempstead*, 272 F. Supp. 226 (U.S.D.C., E.D., N.Y., 1966). The court said, at 231, 'The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come

⁸*Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), is likewise distinguishable on this basis.

from a Federal source.' H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.

"However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

"Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. . . . [T]he Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. . . . The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations."

Appellants urge that, according to this Senate Report, 49 U.S.C. § 1431 was intended to apply only to aircraft "in flight," because *Hempstead* was an "in-flight" case.⁶ We do not believe this argument rests

⁶*American Airlines, Inc. v. Hempstead*, 272 F. Supp. 226 (E.D., N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969); *Allegheny Airlines, Inc. v. Cedar-*

and a sound reading of either the Secretary's letter or the statute.

Pursuant to 49 U.S.C. § 1431, the Administrator of the FAA, after consultation with the Secretary of Transportation, is to prescribe and amend such rules and regulations as he may find necessary to provide for the abatement of aircraft noise. Surely this does not mean abatement of noise of aircraft flying at or above 35,000 feet. That is not the kind of noise from which the public needs "present and future relief and protection. . . ." The statute gives the Administrator power to deal with noise that is offensive to persons on the ground, including the noise created by low-flying aircraft, takeoffs and landings, and the noise created by aircraft on the ground at airports.⁷

Id., 238 F.2d 812 (2d Cir. 1956); and *American Airlines Inc. v. Audubon Park*, 297 F. Supp. 207 (W.D. Ky. 1968), *aff'd per curiam*, 407 F.2d 1306 (6th Cir.), *cert. denied*, 396 U.S. 445 (1969), involved ordinances enacted by cities and towns near major airports. The airports were not within the respective municipalities' boundaries. The ordinances limited the level of noise which could lawfully be created or the altitudes which could lawfully be assumed by overflying aircraft. FAA regulations with respect to landings and takeoffs at the nearby airports required lower elevations and louder sounds than those permissible under the ordinances. The ordinances were, therefore, invalid because to obey them one would have to directly disobey the federal regulations.

The Federal Airport Act of 1946, 49 U.S.C. § 1101 *et seq.*, further emphasizes the interdependence between aircraft and airport. It directs the development of a national plan for:

"[A] system of public airports adequate to anticipate and meet the needs of civil aeronautics. . . . In formulating and revising such plan, the Administrator shall take into account the needs of both air commerce and private flying . . . technological developments . . . [and] probable growth and requirements of civil aeronautics. . . ." 49 U.S.C. § 1102.

The 1968 National Airport Plan prepared by the FAA in accordance with that directive notes:

"Thus, we see in the many forms of air travel—air carrier, general aviation, air cargo—a dominant element of the trans-

(This footnote is continued on next page)

The Secretary's letter emphasizes the status of the one regulating the use of the airport, not the locus of the aircraft when the offensive sounds are produced. A State or local public agency, as the proprietor of an airport, can deny the use of its airport based on noise consideration;⁸ a State or local government cannot use its police power to do so.⁹

The City of Burbank has no proprietorship interest in H-B Airport. It is making an effort to exert its police power in the field of noise regulation, which the Secretary states, and the Committee agrees, has been preempted by the Federal Government. The Supremacy Clause, U.S. Const. art. VI, cl. 2, invalidates that effort.

Prior to the argument of this case, the court invited the State of California to submit an amicus curiae brief and to participate in oral argument directed particularly to the effect of the Environmental Quality Im-

portation industry in the U.S. The speed and efficiency of movement of goods and people obtained through air transportation are vital to our Nation's continued economic growth. Its advantages must be maintained. It is particularly important that the airport, as a principal component in the air transportation network, meets the demands placed on it by this growth." *Id.* at 4.

⁸As the Secretary's letter indicates, this reservation of power to the proprietors of airports to regulate their use derives from *Griggs v. Allegheny County*, 369 U.S. 84 (1962). That case held that Allegheny County, as promoter, owner and lessor of the Greater Pittsburgh Airport, was responsible to pay compensation for easements taken by the operation of the airport.

Pursuant to this proprietorship power, the City of Santa Monica has successfully imposed a curfew, similar to that envisioned by the City of Burbank, on the Santa Monica Airport. *Stagg v. Municipal Court*, 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (1969); see *In re Dreflus*, FAA Regulatory Docket No. 9071 (7/10/69).

⁹See *Opinion of the Justices*, Mass., 271 N.E.2d 354 (1971). But Cf. *Hanover v. Morristown*, 108 N.J. Super. 461, 261 A.2d 692 (1969).

provement Act of 1970, 42 U.S.C. § 4371 *et seq.*, on the issues of this litigation. We have had the advantage of the State's comprehensive brief and its oral comments.

Section 4371(b)(2) of the Environmental Quality Improvement Act places the "primary responsibility for implementing . . ." the national policy for enhancement of environmental quality on "the State and local governments." This general commitment of environmental problems to local regulation does not, however, overcome the preemptive nature of Congress' particular commitment of air commerce problems to the federal domain. *See Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971).

The State also points out that the Federal Aviation Act contains a "saving clause," 49 U.S.C. § 1506,¹⁰ a reservation of common law and statutory remedies, indicating that Congress did not intend to preempt state and local regulatory authority.

"Of course such a general provision does not resolve specific problems, *Arrow Transportation Co. v. Southern R. Co.*, 372 U.S. 658, 671, n. 22, but its inclusion in the statute plainly is inconsistent with congressional displacement of the state statute unless a finding of that meaning is unavoidable." *Head v. Board of Examiners*, 374 U.S. 424, 444 (1963) (concurring opinion).

In this case, we have found the conclusion of federal preemption "unavoidable." Furthermore, the Fed-

¹⁰§1506. Remedies not exclusive

"Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

eral Aviation Act also contains language of exclusivity. 49 U.S.C. § 1508 declares that the United States possesses and exercises "complete and exclusive national sovereignty in the airspace of the United States. . . ." That is the same type of expression which the Supreme Court found in the Federal Tobacco Inspection Act to evidence Congressional intent to establish a wholly federal system which States were powerless even to supplement. *Campbell v. Hussey*, 368 U.S. 297 (1961).

The Conflict Issue

The most recent pronouncement by the Supreme Court in the Supremacy Clause area came in *Perez v. Campbell*, 402 U.S. 637 (1971). There, the Court held that Arizona's Motor Vehicle Safety Responsibility Act conflicted with Section 17 of the Federal Bankruptcy Act, 11 U.S.C. § 35, which states that a discharge in bankruptcy discharges all but certain specified judgments. The state statute called for the suspension of the license of a driver who was involved in an automobile accident and who failed to post sufficient security with respect to potential liability. This suspension was to continue until any judgment debt incurred as a result of the accident was paid and proof of financial responsibility was given. The act expressly stated that release from the judgment debt through federal bankruptcy proceedings would not terminate the license suspension. In determining that there was conflict, the Court stated:

"As early as *Gibbons v. Ogden*, 9 Wheat. 1 (1824), Chief Justice Marshall stated the governing principle—that 'acts of the State legislatures . . . [which] *interfere with*, or are contrary to the laws of Congress, made in pursuance of the con-

stitution,' are invalid under the Supremacy Clause. *Id.* at 211 (emphasis added). Three decades ago Mr. Justice Black, after reviewing the precedents, wrote in a similar vein that, while '[t]his Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, ha[d] made use of the following expressions: conflicting; contrary to; occupying the field, repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference[,] . . . [i]n the final analysis, our function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)." 402 U.S. at 649 (emphasis added).

The Burbank ordinance in question "'stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* The FAA Chief of the Airport Traffic Control Tower at H-B Airport had already issued and put into effect a runway preference order, BUR 7100.5B,¹¹ dealing precisely with the problem of noise in the vicinity of the airport, at the time the Burbank curfew ordinance was passed. No question is raised as to the authority of the Chief of the Tower to issue this order, nor is there doubt as to its official character.

The order stated that "[p]rocedures established for the Hollywood-Burbank airport are designed to reduce community exposure to noise to the *lowest practicable minimum* . . ." (emphasis added). This assertion represents a considered determination by an authorized repre-

¹¹See note 2 *supra*.

sentative of the FAA that measures of the magnitude of that taken by the City of Burbank are beneath "the lowest practicable minimum." The municipal curfew ordinance, therefore, interferes with the balance set by the FAA among the interests with which it is empowered to deal, and frustrates the full accomplishment of the goals of Congress.¹² Because of this conflict, as well as the general preemption of the area of aircraft noise regulation from the exercise of a State or local government's police power, the Burbank ordinance is unconstitutional, illegal and void.

Judge Browning concurs in the judgment and in the portion of the opinion headed "The Conflict Issue."

The judgment of the district court is affirmed.

¹²At the date of the imposition of the curfew PSA operated a jet flight which departed H-B Airport at 11:30 each Sunday night for San Diego. An average of about 80 persons boarded at H-B Airport. The effect of the curfew was to terminate the right of flight of prospective passengers through this portion of the airspace at this time.

APPENDIX B.

**Notice of Appeal to the Supreme Court
of the United States.**

**In the United States Court of Appeals, for the Ninth
Circuit.**

**Lockheed Air Terminal, Inc., et al., Plaintiffs-Appel-
les, Air Transport Association of America, Intervening
Plaintiff-Appellee, vs. The City of Burbank, a muni-
cipal corporation, et al., Defendants-Appellants. No.
71-1242.**

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Attorneys for all Defendants and

Appellants except Samuel Gorlick

Richard L. Sieg, Jr.

Attorney for Defendant and

Appellant Samuel Gorlick

**I. NOTICE IS HEREBY GIVEN that Defendants
and Appellants The City of Burbank, a municipal
corporation; Dr. Jarvey Gilbert, Mayor; Robert R. Mc-
Kenzie, Vice Mayor; Councilman George W. Haven;
Councilman Robert A. Swanson; Councilman D. Ver-
ner Gibson; Joseph N. Baker, City Manager; Samuel
Gorlick, City Attorney for the City of Burbank; and
Rex R. Andrews, Chief of Police of the City of Bur-
bank, hereby appeal to the Supreme Court of the
United States from the Final Judgment of the United
States Court of Appeals for the Ninth Circuit entered**

in this action on March 22, 1972 which held invalid, as repugnant to the Supremacy Clause of the United States Constitution (Article VI, Clause 2), Ordinance No. 2216 of the City of Burbank which added Section 20-32.1 to the Burbank Municipal Code to provide as set forth in Exhibit A attached hereto, and affirmed the judgment of the United States District Court for the Central District of California signed and filed on November 30, 1970 in case No. 70-1075-EC (318 F. Supp. 914, C.D. Cal. 1970).

II. This appeal is taken pursuant to 28 U.S.C. §1254(2).

SAMUEL GORLICK, City Attorney

RICHARD L. SIEG, JR.,

Assistant City Attorney

By /s/ Richard L. Sieg, Jr.

Richard L. Sieg, Jr.

Attorneys for all Defendants and

Appellants except Samuel Gorlick

/s/ Richard L. Sieg, Jr.

Richard L. Sieg, Jr.

Attorney for Defendant and

Appellant Samuel Gorlick

EXHIBIT A

Sec. 20-32.1. Aircraft Take-Offs.

- (a) Pure Jets Prohibited from taking off Between 11:00 P.M. and 7:00 A.M.

It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

- (b) Airport Operator Prohibited from Allowing Take-Offs.

It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

- (c) Exception: Emergencies.

This section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off.

State of California, County of Los Angeles—ss.

MERLE L. MAURER, being first duly sworn deposes and says: That affiant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years, and not a party to or interested in the within action; that affiant's business address is 275 East Olive Avenue, Burbank, California.

That on May 12, 1972, affiant served the within NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon counsel named below by depositing true copies thereof in a United States

mail box at Burbank, California, in sealed envelopes with postage thereon fully prepaid and separately addressed as follows:

O'Melveny & Myers
Warren Christopher
Ralph W. Dau
611 West Sixth Street
Los Angeles, California 90017

Kirtland & Packard
Robert C. Packard
639 South Spring Street
Los Angeles, California 90014

That there is a regular communication by mail between the place of mailing and the places so addressed.

/s/ Merle L. Maurer

Subscribed and sworn to before me this 12th day of May, 1972.

/s/ Irene M. Adams
Notary Public in and for the
State of California

[Seal]

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IN THE
Supreme Court of the United States

October Term, 1971

No. 71-1637

THE CITY OF BURBANK, a municipal corporation; DR.
JARVEY GILBERT, Mayor; ROBERT R. MCKENZIE,
Vice Mayor; Councilman GEORGE W. HAVEN; Coun-
cilman ROBERT A. SWANSON; Councilman D. VERNER
GIBSON; JOSEPH N. BAKER, City Manager; SAMUEL
GORLICK, City Attorney for the City of Burbank and
REX R. ANDREWS, Chief of Police of the City of
Burbank,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., a corporation, PACIFIC
SOUTHWEST AIR LINES, a corporation, and AIR
TRANSPORT ASSOCIATION OF AMERICA,

Appellees.

On Appeal From the United States Court of Appeals
for the Ninth Circuit.

**SUPPLEMENT TO APPENDIX OF
JURISDICTIONAL STATEMENT.**

APPENDIX C.

**Opinion of the United States District Court,
Central District of California.**

United States District Court, Central District of Cali-
fornia.

Lockheed Air Terminal, Inc., a corporation, and
Pacific Southwest Air Lines, a corporation, Plaintiffs,

v. The City of Burbank, a municipal corporation, et al., Defendants. Air Transport Association of America, Intervening Plaintiff. No. 70-1075-EC.

MEMORANDUM FOR USE IN PREPARATION OF
PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, and JUDGMENT.

Filed: September 24, 1970.

The within action is for declaratory relief and injunction whereby the plaintiffs seek to invalidate an Ordinance of the City of Burbank which prohibits the take-off by jet aircraft from Hollywood-Burbank Airport (HBA) between the hours of 11:00 P.M. (2300) and 7:00 (0700), the next day.

The plaintiff Lockheed Air Terminal, Inc., is the owner and operator of HBA. Plaintiff Pacific Southwest Air Lines (PSA) is an intrastate carrier.

The intervening plaintiff, Air Transport Association of America (ATA), is an unincorporated trade association consisting of some 32 carriers commonly known as scheduled airlines. The members of the Association fly approximately 2400 planes, the great majority of which are jet aircraft.

The Federal Aviation Administration (FAA) has filed an Amicus Curiae brief in support of the position of the plaintiffs.

The City of Burbank and certain public officials are named defendants. The People of the State of California (California) filed an Amicus Curiae brief in support of the validity of the Burbank Ordinance (BuOr).

The provisions of Section 1331(a) and 1337 of Title 28, U.S.C., vest this Court with jurisdiction and venue.

The issues of law involved are:

- (1) Has the Federal Government so preempted the fields of the use of air space and the regulation of air traffic as to invalidate and preclude enforcement of the BuOr?
- (2) Is the Ordinance in conflict with Federal statutes or regulations and thereby rendered unenforceable by the Supremacy Clause?
- (3) Would the enforcement of the Ordinance result in intolerable and unreasonable burden on interstate commerce?
- (4) Does the Ordinance constitute an attempted regulation of the phase of the National commerce which, because of the need of National uniformity, demands that its regulation be prescribed by a single authority?

The admitted facts are set forth in the Pre-Trial Conference Order and are as follows:

1. Plaintiff Lockheed Air Terminal, Inc., (hereinafter "Lockheed"), is a corporation organized and existing under and pursuant to the laws of the State of Delaware and is doing business in the County of Los Angeles, State of California. Lockheed, at all times material herein, was and is the owner and operator of the Hollywood-Burbank Airport.

2. Plaintiff Pacific Southwest Airlines (hereinafter "PSA") is a corporation organized and existing under and pursuant to the laws of the State of California and is doing business in the County of Los Angeles, State of California.

3. Intervening plaintiff Air Transport Association of America (hereinafter "ATA") is an unincorporated

trade association, the members of which include virtually all United States scheduled interstate air carriers. Among its 32 members are the following scheduled air carriers which use Hollywood-Burbank Airport: Air West, Inc.; United Air Lines, Inc.; Western Air Lines, Inc. Among its other members is Continental Air Lines, Inc., which obtained authority pursuant to Civil Aeronautics Board Order No. 70-5-52, issued May 12, 1970, "to engage in air transportation with respect to persons, property, and mail . . . between the terminal point Seattle-Tacoma, Wash., the intermediate points Portland, Oreg., and San Francisco-Oakland-San Jose, Calif. (to be served through the Metropolitan Oakland International Airport and the San Jose Municipal Airport), and the terminal point Los Angeles-Ontario-Long Beach-Hollywood-Burbank-Santa Ana-Orange County, Calif. (to be served through the Ontario International Airport, the Long Beach Municipal Airport, the Hollywood-Burbank Airport, and the Orange County Airport)."

4. The City of Burbank is a municipal corporation in the County of Los Angeles, State of California, having power to sue and be sued in its own name;

Dr. Jarvey Gilbert is the duly elected Mayor of the City of Burbank;

Robert R. McKenzie is the duly elected Vice Mayor of the City of Burbank;

George W. Haven, Robert A. Swanson and D. Verner Gibson are duly elected Councilmen for the City of Burbank;

Joseph N. Baker is the City Manager of the City of Burbank;

Samuel Gorlick is the City Attorney for the City of Burbank;

Rex R. Andrews is the Chief of Police of the City of Burbank.

5. The defendants, Gilbert, McKenzie, Haven, Swanson and Gibson, constitute the City Council for the City of Burbank and have the authority to enact and enforce ordinances for the regulation of specified matters within the City of Burbank. Defendant Gorlick and the attorneys within his office have the responsibility of prosecuting violations of ordinances and other misdemeanors within the City of Burbank. The defendant, Rex R. Andrews, as Chief of Police, is responsible for and oversees the enforcement of municipal ordinances including the ordinance here in question.

6. Hollywood-Burbank Airport was dedicated May 30, 1930 and has been in continuous use since that time by both private and commercial aircraft. The Airport provides services to regularly scheduled commercial aircraft as well as to privately owned corporate and general aviation aircraft. Hollywood-Burbank Airport occupies approximately 535 acres, approximately 128 of which are owned by the United States Government. The Airport lies mainly in the City of Burbank and partially in the City of Los Angeles.

7. The City of Burbank has a population of approximately 95,000.

8. On March 31, 1970 the City Council of the City of Burbank duly and regularly adopted Ordinance No. 2216, which added Section 20-32.1 to the Burbank Municipal Code providing as follows:

"Sec. 20-32.1. Aircraft Take-Offs.

"(a) Pure Jets Prohibited from Taking Off Between 11:00 P.M. and 7:00 A.M.

"It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the

Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(b) Airport Operator Prohibited from Allowing Take-Offs.

"It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(c) Exception: Emergencies.

"This section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off."

and said ordinance became effective on May 4, 1970. The stated purpose of the ordinance is "to prohibit pure jet take-offs at the Hollywood-Burbank Airport between 11:00 P.M. and 7:00 A.M."

9. The defendant officials of the City of Burbank have publicly announced their intention to enforce the curfew ordinance.

10. As a result of the process of industrialization and urbanization, almost one out of every twenty people in the United States lives in the Los Angeles five-county area.

11. Hollywood-Burbank Airport is the most convenient airport for the entire San Fernando Valley, Hollywood, and the cities of Burbank, Glendale, Pasadena, and Alhambra, an area containing a population of over 2.2 million persons.

12. Hollywood-Burbank Airport has two principal runways for the operation of aircraft. These runways

are designated by their compass heading in tens of degrees.

(a) The "north-south" runway is situated on an axis of 330° - 150° . This runway is designated Runway 33 when it is used by aircraft taking off to the northwest or landing from the southeast, and, Runway 15 when it is used by aircraft landing from the northwest or taking off to the southeast. Approximately 2,050 feet of the northernmost portion of this runway lie in the City of Los Angeles on land owned by the United States Government.

(b) The "east-west" runway is situated on an axis of 070° - 250° . This runway is designated Runway 7 when it is used by aircraft landing from the west or taking off to the east, and, Runway 25 when it is used by aircraft landing from the east or taking off to the west. Approximately 2,250 feet of the westernmost portion of this runway lie on land owned by the United States Government.

(c) Aircraft landing on Runways 7 and 15 and aircraft departing on Runways 25 and 33 do not overfly the City of Burbank.

13. The following types of pure jet commercial aircraft operate from the Hollywood-Burbank Airport: Boeing 727, Boeing 737, Douglas DC-9. The following types of pure jet business aircraft operate from the Airport: Jetstar, Gulfstream II, Sabreliner, Lear Jet, DeHavilland and Falcon.

14. Each scheduled interstate air carrier that uses Hollywood-Burbank Airport holds an Air Carrier Operating Certificate issued by the Administrator of the FAA, which provides as set forth in said Certificate.

15. PSA holds a Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission which provides as set forth in said Certificate.

16. Each scheduled interstate air carrier that uses Hollywood-Burbank Airport holds an Air Carrier Operating Certificate issued by the Administrator of the FAA, which provides as set forth in said Certificate.

17. PSA holds a Commercial Operating Certificate issued by the Administrator of the FAA, which provides as set forth in said Certificate.

18. The Administrator of the FAA has issued Operations Specifications to each regularly scheduled air carrier that uses Hollywood-Burbank Airport, which Operations Specifications provide as set forth therein.

19. Air West operates Douglas DC-9 aircraft at Hollywood-Burbank Airport. United has operated and operates the following types of aircraft at Hollywood-Burbank Airport: Boeing 727 and Boeing 737. Western operates and has operated Boeing 737 aircraft at Hollywood-Burbank Airport. PSA operates the following types of aircraft at Hollywood-Burbank Airport: Boeing 727, Boeing 737 and Douglas DC-9.

20. Each pilot of a civil aircraft of United States registry operated in the navigable airspace of the United States is required to have in his personal possession a current pilot certificate issued by the Administrator of the FAA (FAR 61.3(a)). Each pilot of an aircraft operated by a scheduled air carrier at Hollywood-Burbank Airport is required to hold a current air transport pilot certificate issued by the Administrator (FAR 61.161). Each flight engineer of a civil aircraft of United States registry is required to have in his per-

shall possess a current flight engineer's certificate issued by the Administrator (FAR 63.3(b)).

21. Pursuant to newly enacted federal legislation, Hollywood-Burbank Airport is required to apply for an Airport Operating Certificate issued by the Administrator of the FAA pursuant to Section 51(b) of the Airport and Airway Development Act of 1970, Public Law 91-258, Stat. (May 21, 1970), within two years from the date of enactment.

22. The FAA operates the Airport Traffic Control Tower and Radar Approach and Departure Control at Hollywood-Burbank Airport. In connection with such operation the FAA has expended approximately \$2 million on the installation of navigational aids at Hollywood-Burbank Airport, including the Instrument Landing System ("ILS"), runway and identification lights, and radar and radio equipment.

23. Pursuant to the Federal Aviation Act of 1958, 49 U.S.C. § 1301, *et seq.*, the Administrator of the FAA has determined that there exists a need for a system that will provide adequate separation between and orderly control of the air traffic emanating from points within and without the United States and converging on large metropolitan areas and airports, such as Hollywood-Burbank Airport. Accordingly, the Administrator has established a system for the control of air traffic which provides for such separation, and which operates within controlled airspace identified as "control zones" and "control areas." Control zones encompass all the airspace from the surface to infinity within five miles of the geographical center of an airport. Control areas are of varying elevations and dimensions, and include the area surrounding Hollywood-Burbank Airport. The

airspace within a control zone below an altitude within 2,000 feet above the surface is defined as the airport traffic area (FAR 1.1). Hollywood-Burbank Airport is located under a control area, within an airport traffic area, within a control zone and under many converging Federal airways, all of which have been established by the Administrator of the FAA pursuant to statutory authority. Unless otherwise authorized by FAA Air Traffic Control, a pilot operating within an airport traffic area must maintain two-way radio communication with the control tower (FAR 91.87(b)). He is further required to comply with all clearances and instructions that may be issued by Air Traffic Control (FAR 91.75(b)). Air Traffic Control over the aircraft within the Hollywood-Burbank Airport Control Zone, including approach control and departure control, is exercised by FAA personnel located in the control tower situated at the airport. Except when in direct communication with the control tower, each regularly scheduled air carrier is required by its Operations Specifications to operate its jet aircraft in accordance with FAA Instrument Flight Rules ("IFR"). When not under the control of an FAA airport control tower, aircraft operating under IFR are under the direct control of an FAA Air Route Traffic Control Center and are required to comply with the clearances received from that facility. (FAR 91.115, 91.75(a)).

24. Prior to the commencement of operations involving jet aircraft landings and take-offs on the two runways at Hollywood-Burbank Airport, a determination was made by the FAA that such use of each runway would not be unsafe either to persons or property on the ground or to persons and property in the air.

25. No aircraft may taxi at or take off from Hollywood-Burbank Airport without first receiving an appropriate clearance from Air Traffic Control (FAR 91.87(h)). When a commercial jet aircraft is ready for departure from its terminal gate, it makes radio contact with Air Traffic Control. It is at that time assigned a runway for take-off and is ultimately given clearance to taxi thereto. Prior to taking its position on the runway, the aircraft is given departure clearance, which includes the assignment of departure procedures and assignment of a radio beam intersection to which the aircraft is directed to fly. On receiving its clearance to take off, each jet or other large aircraft is required to conform with all FAA take-off procedures and to climb to an altitude of 1,500 feet above the airport surface as rapidly as practicable. (FAR 91.87(f)) Departure clearances for IFR aircraft incorporate standard instrument departure procedures established for Hollywood-Burbank Airport by the FAA. Pictorial charts showing these standard instrument departure procedures are published by the Department of Commerce, United States Coast and Geodetic Survey. Aircraft taking off from Hollywood-Burbank Airport must conform with the assigned FAA departure clearance including all standard IFR departure procedures incorporated therein (FAR 91.75(a), 91.116). Upon reaching an altitude and position clear of other traffic, control of the aircraft is passed from Hollywood-Burbank Departure Control to the FAA Air Route Control Center located at Palmdale, California.

26. On entering and operating within the Hollywood-Burbank Airport Traffic Area, jets and other large aircraft must be operated at an altitude of at least 1,500 feet except when further descent is re-

quired for a safe landing. (FAR 91.87(d)(2)) No aircraft may be landed at Hollywood-Burbank Airport without first receiving an Air Traffic Control clearance (FAR 91.87(h)). In addition to exercising approach control, the FAA maintains and operates an Instrument Landing System ("ILS") which electronically establishes a three-degree glide slope to Runway 7 at Hollywood-Burbank Airport. Each of the aircraft operated by the regularly scheduled air carriers is equipped with electronic devices that monitor the ILS glide slope and depict the glide slope position in relation to that of the aircraft on the cockpit instrument. On receiving FAA clearance to approach for landing, the aircraft is required to be at or above the glide slope at the outer ILS marker and to remain at or above the glide slope until reaching the middle ILS marker. (FAR 91.87(d)(2)) The outer marker is located approximately 6.1 nautical miles from the approach end of Runway 7, while the middle marker is located approximately 1.8 nautical miles from the approach end of the runway. The glide slope altitude at the outer ILS marker is approximately 2,000 feet above the surface and at the middle marker is approximately 575 feet above the surface. As an additional means of approach control, the FAA prescribes standard instrument approach procedures which are published in Part 97 of the Federal Aviation Regulations. Pictorial approach and landing charts showing these standard instrument approach procedures are published by the Department of Commerce, United States Coast and Geodetic Survey. Approaches to Hollywood-Burbank Airport conducted under instrument flight rules are required to be in accordance with the standard instrument approach procedures set forth in Part 97 of the Federal Aviation Regulations (FAR 91.116).

27. In the interest of alleviating noise disturbances to the residents of communities adjoining airports located in metropolitan areas, the Administrator of the FAA has established regulations that (1) require turbine powered fixed wing aircraft, approaching for landing, to maintain within the airport traffic area an altitude of at least 1,500 feet above the surface of the airport "until further descent is required for a safe landing," and (2) require such aircraft, when taking off, to climb to 1,500 feet as rapidly as practicable (FAR 91.87(d), (f)).

28. From February 1968 until July 12, 1970, PSA operated a Boeing 727 aircraft which departed the Hollywood-Burbank Airport at 11:30 P.M. each Sunday night destined for San Diego. This was the only regularly scheduled flight taking off from Hollywood-Burbank Airport between the hours of 11:00 P.M. and 7:00 A.M. This was an intrastate flight originating in Oakland, California with its final destination San Diego, California.

29. Since March 9, 1970 PSA has operated a Boeing 727 or Boeing 737 aircraft on charter to Lockheed California Company which aircraft departs from the Hollywood-Burbank Airport Monday through Friday at 6:40 A.M. destined for Palmdale. This flight is being permitted to operate by the City as an emergency flight.

30. Several fleets of corporate jet aircraft use Hollywood-Burbank Airport as their home base. Prior to the enactment of the curfew ordinance, there were at least three flights per week of corporate jet aircraft during the now-proscribed curfew period.

31. Lockheed Aircraft Corporation operates and maintains military defense plant facilities at Hollywood-Burbank Airport.

The plaintiffs urge that the BuOr is invalid for the following reasons:

(a) The preemption of the field of efficient management of the use of the navigable air space by the Federal Government by statute and regulations and through its agencies, FAA and Civil Aeronautics Board (CAB),

(b) The direct conflict between the BuOr and Federal statutes, regulations and Certificates of Public Convenience and Necessity issued to airlines by the CAB, and

(c) The ordinance is an intolerable and unreasonable burden on interstate commerce.

The defendant City of Burbank and its officials and the People of California contend that there has been no preemption in the field of navigable air space control, of limitation of aircraft take-offs by the Federal Government, or its agencies, which would invalidate the BuOr. The City urges that the Ordinance is in reality a "land use" regulation and that Lockheed, as the owner and proprietor of HBA, has the authority to place valid limitations on take-offs of jet aircraft during the curfew and that the City can, in turn, control Lockheed with respect to its land use.

Reliance as to land use is on a statement of the Senate Committee in 1968 to the effect that it was not the intent of the Committee, in recommending the air noise abatement legislation H.R. 3400, to effect any change in the existing apportionment of powers between the Federal and State and local governments

and that the authority of units of local government to control the effects of aircraft noise through the exercise of land use planning and zoning powers was not diminished by the bill. S.Rep. 1353, July 1, 1968, U.S. Code, Congressional and Administrative News, 1968, pages 2693-94.

With respect to the Commerce Clause, the defendants argue that in considering the effect of the Ordinance on interstate commerce the Court is limited to the flights out of HBA during the curfew hours and that only the intrastate carrier PSA is involved since that is the only line authorized by the California Public Utilities Commission which has jet aircraft scheduled to take off during curfew. There are privately owned jet planes that fly out of HBA between 11:00 P.M. and 7:00 A.M., but which do not have Certificates of Public Convenience and Necessity from California or CAB.

PREEMPTION

The House Report 2360, 85th Congress, 2nd Session, on the Federal Aviation Act of 1958, states as to its purpose: "The principal purpose of this legislation is to establish a new Federal agency with powers adequate to enable it to provide for the safe and efficient use of the navigable airspace by both civil and military operations." [Page 3741.]

That Act established the Federal Aviation Agency, now Federal Aviation Administration, in replacement of the then Civil Aeronautics Administration. The FAA was vested with "plenary authority to—(a) Allocate airspace and control its use by both civil and military aircraft."

The Senate Report 1811 on the 1958 Act, after observing that the action of the CAB in its control over airspace allocation and air traffic rules rested for the

most part upon “* * * the shifting sands of legal ambiguity”, says: “The present legislation proposes to clear away this ambiguity once and for all by vesting unquestionable authority for all aspects of airspace management in the Administrator of the new Agency.” The report thereafter states: “The splintering of airspace management in the past through committee and panel negotiation has already been discussed. It is one of the evils which this bill is designed to eliminate. As indicated above, it is for this reason that the bill proposes to vest in a single Administrator plenary authority for airspace management. If such authority is once again fractionalized and made subject to committee or panel decision, the evil will only be continued.” In the same report, the Committee observes: “The number of planes seeking their share of our airspace has almost quadrupled since 1938. Furthermore, the larger and faster that aircraft have become, the more airspace is required for each if proper separation is to be maintained.”

The defendants rely on *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1959), as authority for their position that intent to preempt shall not be implied

“* * * unless the act of Congress fairly interpreted is in actual conflict with the law of the State.”

[Page 443.]

The Supreme Court further observes that in consideration of whether a State law has imposed an undue burden in interstate commerce, we should be mindful of the fact that the Constitution, when conferring upon Congress the regulation of commerce, did not intend

“* * * to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indi-

rectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.' [Citing cases.] But a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary." [Citing cases] [Pages 443-44.]

The Detroit Ordinance which was upheld by the Supreme Court involved smoke abatement, and had been violated by one of the ships of appellant company duly licensed to operate in interstate commerce under a regulation enacted by Congress. Air pollution is a local problem and the purpose of the Ordinance was to protect the health and enhance the cleanliness of the local community.

The Court concluded that the mere possession of a Federal license did not immunize the ship from the operation of the normal incidents of police power, not constituting a direct regulation of commerce. Furthermore, the Ordinance did not exclude a licensed vessel from the Port of Detroit, "* * * nor does it destroy the right to free passage." [Pages 447-48.]

Applying the rules in the Huron case to the case at bar, we must determine whether the Federal Government, as evidenced by the acts of Congress and regulations involved, intends to fully occupy the field of control of the navigable air space to insure its efficient use. Whether the Ordinance brings to bear an unreasonable burden on interstate commerce is also involved and will be discussed in more detail later in this Memorandum.

The question of intent to fully occupy the pertinent field was considered by the Supreme Court in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926). The Georgia statute there involved required curtains and automatic fire-box doors on locomotives. The Court said that the main question in the three cases which were involved on the appeal was whether the Boiler Inspection Act

“* * * has occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation. Congress obviously has power to do so.” [Citing cases.]

The Court said that the Interstate Commerce Commission Boiler Inspection Act applied to locomotives in interstate commerce even if operated wholly within one State and not engaged in hauling interstate freight. The Act did not require any particular type of fire-box door but the Court said that although the Commission had made no other requirement inconsistent with the State legislation that fact was without legal significance.

“It is also urged that, even if the Commission has power to prescribe an automatic fire-box door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad

scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose. [Citing cases.]”

In answering the question as to whether the Federal Government acted with the intent to preempt a field, the Supreme Court, in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), set forth, in the disjunctive, three tests to be applied:

“So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611; *Allen-Bradley Local v. Wisconsin Employment Board*, 315 U.S. 740, 749. Such a purpose may be evidenced in several ways.

(1) The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co. v. Public Service Comm’n*, 250 U.S. 566, 569; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148. (2) Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines v. Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission*, 236 U.S. 439; *Charleston & W. C. R. Co. v. Varn-*

ville Co., 237 U.S. 597; *New York Central R. Co. v. Winfield*, 244 U.S. 147; *Napier v. Atlantic Coast Line R. Co.*, *supra*. (3) Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill v. Florida*, 325 U.S. 538. It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide. *Townsend v. Yeomans*, 301 U.S. 441; *Kelly v. Washington*, 302 U.S. 1; *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177; *Union Brokerage Co. v. Jensen*, 322 U.S. 202." [Underscored numbers (1), (2) and (3) added.] Pages 230-31.

In applying the rules in the *Rice* case, *supra*, to the case at bar, we consider the facts and circumstances here involved.

The terms of the 1958 Federal Aviation Act would appear to encompass the efficient use and control of the navigable air space in all aspects of its use by aircraft. Control was effected of the traffic density by regulation 14 F.C.R. 93.121-31, in limiting the instrument flight rules (IFR) operations in high density airports, Kennedy and LaGuardia (N.Y.), Newark (N.J.), O'Hare (Chicago), and Washington National Airport (Wash., D.C.). In limiting the allocations of flights as to various classes of aircraft, the number of flights varied during different periods of a twenty-four hour day.

By way of comment on the regulations applying to the above named high density airports, it is reported in

Federal Register, Vol. 33, No. 234, page 17896, Dec. 12, 1968—part 93, that the allocation of flights was to provide relief from excessive delays, not to correct safety problems. At page 17897, the FAA Administrator says: “* * * the public interest in efficient, convenient, and economical air transportation requires more effective use of airport and airspace capacity. The authority of the FAA to regulate aircraft operations to reduce congestion is clear. The plenary authority conferred by the Federal Aviation Act to regulate the flight of aircraft to assure the safe and efficient utilization of the navigable airspace is well established by practice and judicial decision.”

Congress and the Administrator are fully cognizant of the problems created by aircraft noise. The Administrator, on page 17897 of the Federal Register, *supra*, refers to the fact that current scheduling practices reflect that two-thirds of the international passenger flights at Kennedy airport were scheduled to arrive or depart between 3:00 P.M. and 11:00 P.M., but that under the allocations imposed some re-scheduling of these flights might be required. He said that international departures fall off abruptly after 10:00 P.M. and *clearly it would not be in the public interest, considering resultant noise disturbances, to encourage scheduling of more flights at later hours.* The paragraphs 93.121-131 of the regulation referred to above appear on page 17898 of Volume 33, Federal Register, *supra*.

In the instant case, the FAA, on September 4, 1969, issued a noise abatement order for HBA making runway No. 25 a preferential runway for departure from 11:00 P.M. to 7:00 A.M. (Bur. 7100.5B, para. 5c, *plffs'* Ex. 30). This preference was a noise abatement measure for the benefit of the City of Burbank. See

Exhibit A hereto for map including the City of Burbank and showing the location of HBA. This map is a portion of plaintiffs' Exhibit No. 1 herein, to which the Court has added the numbered runways 33 and 25 together with the direction of aircraft approach and take-off on all four runways involved.

Further efforts of Congress to control and abate aircraft noise are encompassed in the provisions of Section 1431, Title 49, United States Code, passed by Congress in 1968 and providing for the FAA Administrator to prescribe such rules and regulations he may find necessary to control and abate aircraft noises and sonic boom.

From the broad scope of Federal statutes and regulations governing and controlling the use of air space and of air traffic, it would appear that Congress intended to centralize full and dominant control of the navigable air space in the Federal Government so as to provide for its safe and most efficient use.

Included in the statutes in this field are 49 U.S.C. §§ 1301(24), 1303, 1304, 1341(a), 1348 and 1508.

It is true that Section 1506 of Title 49, U.S.C., states that the provisions of Chapter 20 (Title 29, "Federal Aviation Program") are in addition to the remedies then existing "* * * at common law or by statute." Defendants also point to Senate Report 1353, July 1, 1968, *supra*, wherein it is stated: "It is not the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State local governments." Page 2693. It is to be noted that the Senate Report, at pages 2693 and 2694, also states: "The courts have held that the Federal Government presently preempts

the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines v. Town of Hempstead*, 272 F. Supp. 226 (U.S.D.C., E.D., N.Y., 1966). The court said, at 231, 'The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source.' H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft."

In evaluating Section 1506, *supra*, and the statements of the Senate Committee, we must have in mind the rules governing preemption as announced by the Supreme Court and the provisions of the Commerce Clause of the United States Constitution.

In *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), the Supreme Court states at page 107:

"Of course, air transportation, water transportation, rail transportation, and motor transportation all have a kinship in that all are forms of transportation and their common features of public carriage for hire may be amenable to kindred regulations. But these resemblances must not blind us to the fact that legally, as well as literally, air commerce, whether at home or abroad, soared into a different realm than any that had gone before. Ancient doctrines of private ownership of the

air as appurtenant to land titles had to be revised to make aviation practically serviceable to our society. *A way of travel which quickly escapes the bounds of local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past.* [Emphasis added.]

Mr. Pyle, Director of Aviation Development Council at La Guardia airport, New York City, testified: "The approach to the solution of problems in air transportation at the local level just does not work. It has to be done on a national basis because it is a national operation." [R. Tr. 349.] He also stated that air transportation was to be differentiated from surface transportation because of the variance in the degree of flexibility between the two.

In viewing the effect of the BuOr with respect to preemption and the Commerce Clause issues, it appears that the Ordinance should be considered from the national level. The Supreme Court so held as to the railroads in *Chicago vs. Santa Fe*, 357 U.S. 77, 86-87 (1957).

The case of *American Airlines v. Town of Hempstead*, 272 F. Supp. 226 (D.C., E.D., N.Y., 1966), involved an Ordinance regulating noise levels which denied the lower air space to aircraft and closed the landing approaches and take-off paths of the Hempstead airport. The court said that the decisive question was whether the Ordinance " * * * conflicted with Federal law, or invades a field of legislation reserved to the National government."

In discussing the test of power to enact the Ordinance, the court states:

"Such an ordinance as Hempstead's cannot be considered in the accident of its particular circumstances. * * * In the perspective of power, the ordinance must be tested as if it were one of a set of ordinances each enacted by a bordering town, and all, taken together, enveloping the airport. Diversion of the airport traffic over another Town would then be impossible and each ordinance would be revealed in its inner nature as a direct regulation of aircraft flight. * * * The question remains, may the municipalities that surround an airport adopt such ordinances as Hempstead's which deny to aircraft those parts of the navigable air space that cannot be used without causing noise on the ground in excess of specified limiting noise spectra.

"* * * legislation, whatever its purpose, that denies access to navigable air space by local rule cannot but be regarded as a plain and forbidden exertion of the power to regulate commerce as such. * * *

"But even if the commerce clause were not thought without more to preclude local action of the kind here involved, the actual exercise by the Congress of the power to regulate in this field is so pervasive as to preclude valid enactment of the Hempstead Ordinance. It would be difficult to visualize a more comprehensive scheme of combined regulation, subsidization and operational participation than that which the Congress has provided in the field of aviation." [Pages 231-32.]

After enumerating the Federal statutes, regulations and activities of Federal agencies in the field of air navigation and traffic, the Court observes:

"The federal regulation of air navigation and air traffic is so complete that it leaves no room for such local legislation as the Hempstead Ordinance." [Citing numerous cases.] Page 233.

At page 235 the Court says:

"Local initiative in noise control of aviation is inherently an effort to regulate a consequence while disclaiming regulation of the cause. It cannot coexist with a comprehensive system of federal regulation of aircraft manufacture (through certificates of airworthiness) and federal regulation of air navigation and air traffic."

VIOLETION OF COMMERCE CLAUSE

Congress is vested with the authority to regulate commerce among the States by Article I, Section 8, Clause 3, of the Constitution. The rule is well established that state and local governments may not unreasonably burden commerce by their acts. The BuOr, while it does not seek to completely deny the use of navigable air space, does seek to eliminate its use by jet aircraft for eight hours of the day.

Continental Airlines, an interstate carrier by virtue of Certificate of Public Convenience and Necessity issued by the CAB on May 12, 1970, Exhibit 9, now serves the Hollywood-Burbank area from the HBA. One of its scheduled routes is from Burbank to Seattle-and return. The evidence shows that if Seattle imposed an ordinance similar to the BuOr no jet aircraft could leave Seattle, or any city in the Northwest, for HBA after

7:00 P.M., nor could a plane depart HBA for Seattle after 7:00 P.M., in order to arrive at the respective destinations before the nocturnal curfew hour of 11:00 P.M. Thus, with such an Ordinance in effect in only two airports the hours of take-off from both airports for flights to and from Seattle would be curtailed to only twelve hours of the day, not eight hours as in the case of the curfew in force at only one of the airports.

The Certificate of Public Convenience and Necessity now issued to scheduled airlines by the CAB authorizes them to fly a specific route or routes and also obligates the line to give *adequate service* to the cities on their routes. [R. Tr. 232.]

General Von Kann, Vice-President, Operations and Engineering, of Air Transport Association of America, testified that a curfew Ordinance, if valid, would be adopted by virtually all types of local airport authorities. [R. Tr. 322.] Mr. Pyle testified in similar vein. [R. Tr. 334.]

The noise problem created by jet aircraft is well known and it appears to the Court that a curfew Ordinance, if valid, would promptly be adopted by virtually all cities surrounding airports. Considered singly, such an Ordinance might not impose an unlawful interference with interstate commerce in all cases. However, considered on a national level, the Ordinance could not stand. Based on authorities discussed hereinabove, the Court concludes, as noted above, that in determining the effect on commerce the Ordinance is to be considered on a national basis. Mr. Mitchell, Vice-President of Continental Airlines in charge of corporate planning, Mr. Pyle, and General Von Kann, testified in depth on the effect of such an Ordinance,

on a national basis, on interstate commerce as well as on the efficient use of the air space. Some 1009 flights of scheduled airlines would have to be eliminated or re-scheduled. [Exhibit 52, R. Tr. 103-06.] Position problems as to planes would eliminate 1370-odd additional flight operations. [R. Tr. 336.]

Approximately 48% of air mail and 42% of air freight is moved at night. [Exhibit 55, R. Tr. 337-39.] It should be noted that no air mail is flown out of HBA.

If the experience of Continental is average, the Ordinance on a national basis would increase costs by 25% (R. Tr. 261-63) by reason of the loss in the utilization of aircraft as well as the required purchase of new planes to meet the concentration of flights within the permitted hours of take-off, if, in fact, the re-scheduling of flights so eliminated could be accomplished from a practical standpoint. Additional maintenance shops would also have to be established by all airlines to accomplish the required maintenance at necessary locations for proper and efficient use of their planes. [R. Tr. 302-305.]

It appears from the evidence that there would be a very serious loss of efficiency as to the use of air space if a national curfew were imposed. Obviously, if the use of the air space at HBA were curtailed by eight hours per day and this limitation of use time compounded by the adopting of such Ordinance effective as to other airports used by interstate and intrastate airlines, the carriage of interstate passengers and goods would be seriously interrupted and would conflict with the certificated rights and obligations of such airlines. See *Castle v. Hayes Freight Lines*, 348 U.S. 61, 63-64

(1954), where the Court held the State of Illinois was without authority to revoke or suspend operations in that state of an interstate motor carrier for violation of a law regulating the weight of loads to be carried on the state's highways. *Southern Pacific v. Arizona*, 325 U.S. 761, 767 and 775 (1945), where the Supreme Court held invalid an Arizona Ordinance regulating the length of trains, the Court observing that if one state may regulate train lengths so may all others, resulting in a serious impediment to the free flow of commerce.

There is no conflict in the evidence adduced in this case and it should be concluded that air commerce, by reason of its speed and volume, requires a single authority in control if it is to be conducted at maximum safety and efficient use of the navigable air space.

The evidence discloses that air traffic is unique and should be controlled on the national level.

The case of *Stagg v. Municipal Court of Santa Monica*, 82 Cal. Rptr. 578 (Dec., 1969), is relied on by the defendants in support of their contention that there is no preemption by the Federal Government of the field covered by the BuOr so as to make the Ordinance invalid and unenforceable.

The Santa Monica Airport (SMA), which was involved, was city owned and the California District Court of Appeals (DCA) held a curfew Ordinance adopted by the City of Santa Monica, which precluded jet aircraft from taking off from the SMA between the hours of 11:00 P.M. and 7:00 A.M. the next day, to be valid. The SMA is not used by scheduled or intrastate airlines. The Appellate Court reversed the Superior Court's ruling that "* * * the Ordinance was invalid because its subject matter was preempted by

State law." The DCA held that the field was not so preempted and in the instant case the Attorney General also asserts non-preemption of the field by the State. At page 579 of its opinion, the DCA, in referring to the Superior Court, says:

"The court found it unnecessary to decide whether there was any federal preemption."

It observes two paragraphs later:

"Preliminarily, it must be recognized that the doctrine of federal preemption has no application here."

The opinion of the DCA, as to preemption, appears to turn on its conclusion that the curfew Ordinance was an unreasonable regulation which only incidentally affected the right of flight but did not impair that right. The Court, after stating its research, disclosed no Federal or California enactment which directly conflicts with the Ordinance in question, states:

"The United States by virtue of its sovereignty over navigable airspace has the paramount power to regulate air traffic. Federal statutes, after defining navigable airspace * * *, authorize the administrator to regulate the use of navigable airspace and to establish rules governing the flight, navigation, protection and identification of aircraft." [Page 580.]

The Court did not ground its decision on the proprietary capacity of the city but did discuss the city's rights to regulate its municipally owned airport as a public utility and the authority of the city to regulate the use of the airport under Section 50470-74, California Government Code. [Pages 580-81.]

Loma Portal Civic Club v. American Airlines, Inc., 39 Cal. Rptr. 708 (1964), a decision of the California Supreme Court in bank, is cited and discussed by the DCA in the Stagg case, *supra*. The members of the Loma Portal Civic Club resided in the flight path of jet aircraft using adjacent Lindbergh Field in San Diego. They sought to prohibit such flights at low altitudes and at such times as to interfere unreasonably with the use and enjoyment by plaintiffs of their homes.

The Court denied injunctive relief but did not find preemption on the part of the Federal Government as a grounds for precluding the relief sought. In denying relief, the Court said:

"It is clear, therefore, that it would be contrary to the policy of this state to grant an injunction against flight operations in the vicinity of a public airport, conducted by regularly scheduled, certificated airlines, not alleged to be conducted in violation of federal orders and regulations or in an imminently dangerous manner, and not alleged to be carried on in a manner inconsistent with the public interest inhering in the continuation of such service.

* * *

"We hold here that under the facts of this case, i.e., the operation of aircraft with federal airworthiness certificates in federally-certificated, scheduled passenger service, in conformity with federal safety regulations, in a manner not creating imminent danger, and in furtherance of the public interest in safe, regular air transportation of goods and passengers, an injunction is not available." [Pages 713-14.]

Reference is also made by the Court to the right of landowners who suffer from aircraft annoyances to seek damages from the owner or operator of the aircraft or the owner or operator of the airport involved. It also points out that it is not making a determination with respect to the rights of the parties where private airplanes and airports are concerned. [Pages 714, 715-16.]

The Court, in *American Airlines v. Town of Hempstead*, 272 F. Supp. 226, supra, also discussed the right of landlords to just compensation if overflights are of such a nature as to amount to a taking of property for public purposes. [Page 231.]

Prior to the decision in the Stagg case, supra, the City Attorney of Burbank rendered an exhaustive opinion to the Burbank City Manager, dated September 22, 1969, wherein he concluded that the City of Burbank had no power to limit or restrict flights of aircraft utilizing HBA. Copy of the opinion appears as Exhibit A to the supplemental memorandum of points and authorities filed by plaintiffs Lockheed and PSA on May 22, 1970.

The City Attorney now explains that his conclusion was based on the theory that the State of California had preempted the area of restriction of flights and amount of noise emitted by jet aircraft. However, on page two of the opinion, the City Attorney says: "The City of Burbank has no power to establish restrictions on flights or the amount of noise which may be emitted by aircraft using the Hollywood-Burbank airport for the reason that this area of control has been preempted by the State and Federal governments."

The opinion discusses several of the cases cited by counsel on both sides in the case at bar as well as the

activities of the Federal Government in the field involved.

In summarizing the opinion it is said, the residents in the vicinity of the HBA should limit their complaints to Lockheed Air Terminal and present their views as to noise to the FAA and the Department of Aeronautics of the State of California and that legislative action can only be accomplished by the Congress of the United States or the State Legislature.

The problems created by noise from jet aircraft are serious and disturbing, to say the least. Effective means has not as yet been found to reduce the noise to desired sound levels. In some airports the required use of certain runways in take-off will send the aircraft out over the ocean or other non-populated areas. However, in the landlocked, thickly populated area in which HBA is located, the use of preferential noise abatement runways is helpful to reduce the noise over Burbank but it merely diverts it to other populated areas. It will be noted from Exhibit A hereto that planes taking off on runway 25 are not over Burbank at any time, and the evidence shows that those taking off on runway 15, with destination to the North, turn West after take-off and are in the Burbank air space but for a very short time.

Our scientific and mechanical expertise has not yet solved the problem of noise resulting from the generation of power by jet engines. However, if the time during which the navigable air space may be used is to be curtailed, the Court concludes that the action must come from Congress, or its authorized agency, if the safe and efficient use of the air space is to be maintained and interstate commerce protected from unreasonable burden and interference.

The plaintiffs are entitled to injunctive relief, as prayed, and for their costs of suit herein.

Plaintiffs' counsel are requested to prepare, serve and lodge proposed Findings of Fact, Conclusions of Law and Judgment in accordance with the provisions of Local Rule 7.

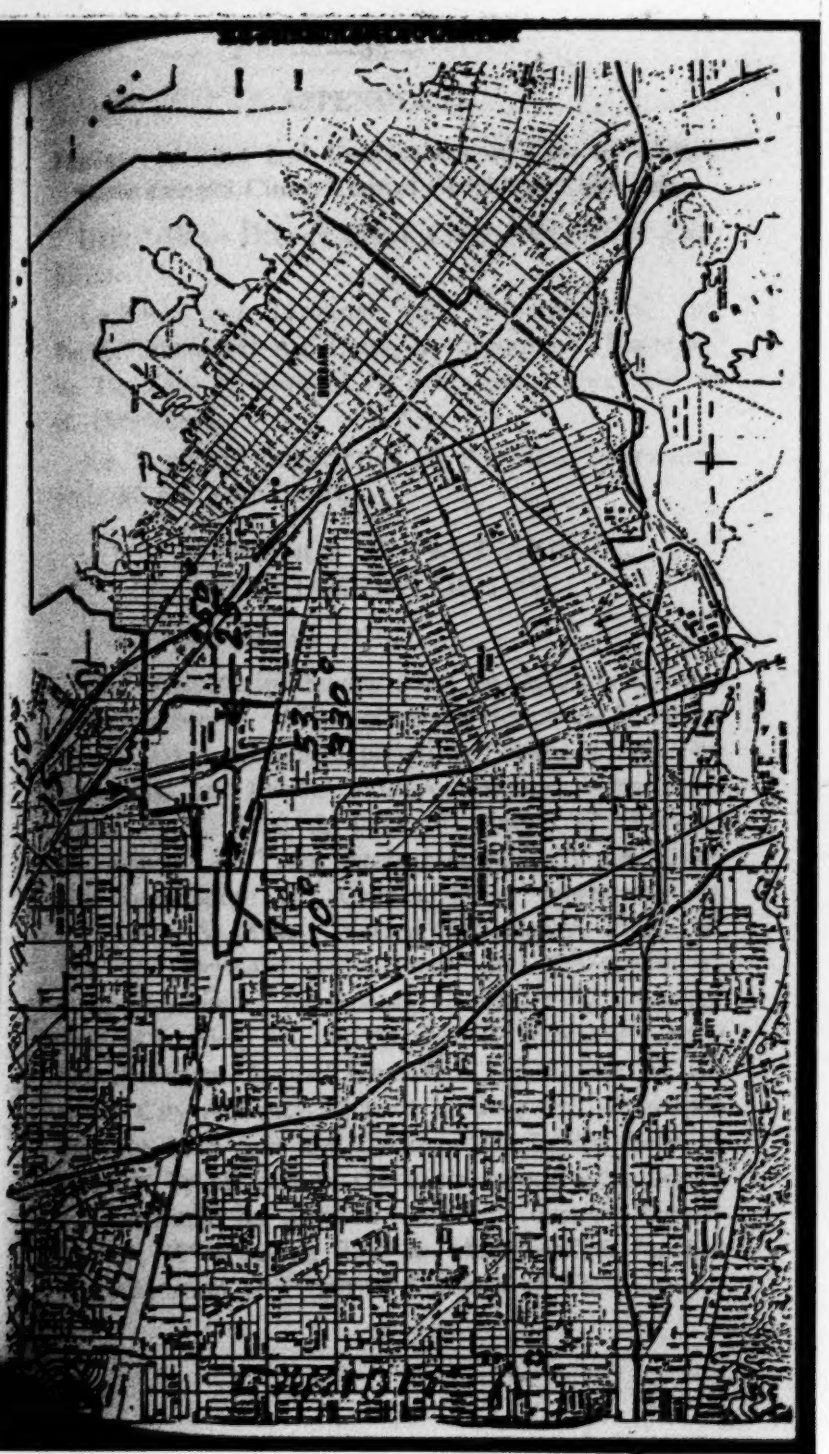
This Memorandum is not to be deemed a final judgment.

DATED: September 24, 1970.

/s/ E. Avery Crary

E. Avery Crary

United States District Judge



APPENDIX D.

Findings of Fact and Conclusions of Law of United States District Court, Central District of California.

United States District Court, Central District of California.

Lockheed Air Terminal, Inc., a corporation, and Pacific Southwest Air Lines, a corporation, Plaintiffs, vs. The City of Burbank, a municipal corporation, et al., Defendants.

Air Transport Association of America, Intervening Plaintiff. No. 70-1075-EC.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed: November 30, 1970.

The within action having come on regularly for trial on September 15, 1970, before the Honorable E. Avery Crary, Judge presiding, plaintiffs Lockheed Air Terminal, Inc. and Pacific Southwest Airlines being represented by Kirtland & Packard, Robert C. Packard and Winston F. Tyler, intervening plaintiff Air Transport Association of America being represented by O'Melveny & Myers, Warren Christopher, Ralph W. Dau and Bertrand M. Cooper, and defendants all being represented by Samuel Gorlick, City Attorney, Richard L. Sieg, Jr., and Michael R. Murnane, except that defendant Samuel Gorlick is represented by Assistant City Attorney Richard L. Sieg, Jr., whereupon evidence both oral and documentary having been introduced by all parties, the cause having been argued and submitted for decision, and the Court on September 24, 1970 having filed its Memorandum for Use in Preparation of Proposed Findings of Fact, Conclu-

sions of Law, and Judgment, whereupon plaintiffs and intervening plaintiff having submitted Proposed Findings of Fact and Conclusions of Law and Judgment, defendants having filed their objections thereto and having requested additional findings, and the Court having heard the argument of counsel thereon;

WHEREFORE, the Court being fully advised in the premises now renders its decision as follows:

FINDINGS OF FACT

1. Plaintiff Lockheed Air Terminal, Inc. (hereinafter "Lockheed") is a corporation organized and existing under and pursuant to the laws of the State of Delaware and is doing business in the County of Los Angeles, State of California. Lockheed, at all times material herein, was and is the operator of the Hollywood-Burbank Airport and the owner of all but those portions of the Airport Described in Findings Nos. 6 and 18 which are held under lease from the federal government.

2. Plaintiff Pacific Southwest Airlines (hereinafter "PSA") is a corporation organized and existing under and pursuant to the laws of the State of California and is doing business in the County of Los Angeles, State of California.

3. Intervening plaintiff Air Transport Association of America (hereinafter "ATA") is an unincorporated trade association, the members of which include virtually all United States scheduled interstate air carriers. Among its 32 members are the following scheduled air carriers which use Hollywood-Burbank Airport: Air West, Inc.; Continental Air Lines, Inc.; United Air Lines, Inc.; and Western Air Lines, Inc.

4. The City of Burbank is a municipal corporation in the County of Los Angeles, State of California, having power to sue and be sued in its own name;

Dr. Jarvey Gilbert is the duly elected Mayor of the City of Burbank;

Robert R. McKenzie is the duly elected Vice Mayor of the City of Burbank;

George W. Haven, Robert A. Swanson and D. Verner Gibson are duly elected Councilmen for the City of Burbank;

Joseph N. Baker is the City Manager of the City of Burbank;

Samuel Gorlick is the City Attorney for the City of Burbank;

Rex R. Andrews is the Chief of Police of the City of Burbank.

5. The defendants Gilbert, McKenzie, Haven, Swanson and Gibson constitute the City Council for the City of Burbank and have the authority to enact and enforce ordinances for the regulation of specified matters within the City of Burbank. Defendant Gorlick and the attorneys within his office have the responsibility of prosecuting violations of ordinances and other misdemeanors within the City of Burbank. The defendant Rex R. Andrews, as Chief of Police, is responsible for and oversees the enforcement of municipal ordinances including the ordinance here in question.

6. Hollywood-Burbank Airport was dedicated May 30, 1930, and has been in continuous use since that time by both private and commercial aircraft. The Airport provides services to regularly scheduled commercial aircraft as well as to privately owned corporate and

general aviation aircraft. Hollywood-Burbank Airport occupies approximately 535 acres, approximately 128 of which are owned by the United States Government. The Airport lies mainly in the City of Burbank and partially in the City of Los Angeles.

7. The City of Burbank has a population of approximately 95,000.

8. On March 31, 1970, the City Council of the City of Burbank duly and regularly adopted Ordinance No. 2216, which added Section 20-32.1 to the Burbank Municipal Code providing as follows:

"Sec. 20-32.1. Aircraft Take-Offs.

"(a) Pure Jets Prohibited from Taking Off Between 11:00 P.M. and 7:00 A.M.

"It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(b) Airport Operator Prohibited from Allowing Take-Offs.

"It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(c) Exceptions: Emergencies.

"This section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off."

and said ordinance became effective on May 4, 1970.

The stated purpose of the ordinance is "to prohibit pure jet take-offs at the Hollywood-Burbank Airport between 11:00 P.M. and 7:00 A.M."

9. The defendant officials of the City of Burbank have publicly announced their intention to enforce the curfew ordinance.

10. Almost one of every twenty people in the United States lives in the Los Angeles five-county area. This area is served by scheduled air carriers conducting operations from the Los Angeles International Airport and from four "satellite" airports: Hollywood-Burbank Airport, Long Beach Metropolitan Airport, Orange County Airport and Ontario International Airport.

11. Satellite airports are airports that serve geographical areas immediately adjacent to major metropolitan areas which also have one or more hub or major airport facilities. Other examples of satellite airports are the Oakland International Airport and San Jose Municipal Airport in the San Francisco area.

12. All of the above named satellite airports are surrounded by reasonably well-defined geographical areas which, by reason of the population they serve and their stage of urban development, warrant additional air services in their own right. Many persons living in these various geographical areas find it more convenient and responsive to their needs to have air service provided through their respective satellite airports than to continue their dependence upon the hubs.

13. Satellite airports play an essential role in the national air transportation system in relieving air and ground congestion, in reducing air traffic delays at primary airport centers, and in providing more con-

venient service to the surrounding population centers, which are of sufficient size and economic power to justify their own air service. This important role has been and is recognized and implemented by the Civil Aeronautics Board in its route investigations.

14. Hollywood-Burbank Airport is an important satellite airport in the national air transportation system and forms a vital link in interstate and intrastate air commerce. It is the most convenient airport in the greater Los Angeles metropolitan area for the entire San Fernando Valley, Hollywood and the cities of Burbank, Glendale, Pasadena and Alhambra, an area containing a population of over 2.2 million persons.

15. The Burbank City Council has on several occasions, and as recently as May 13, 1969, requested and supported additional air transportation services at the Hollywood-Burbank Airport in various route proceedings before the Civil Aeronautics Board and the California Public Utilities Commission.

16. On May 12, 1970, in its Pacific Northwest-California Investigation, Docket No. 18884, the Civil Aeronautics Board determined that additional air service was required between the Pacific Northwest and the Los Angeles metropolitan area. The Board awarded a new route to Continental Air Lines and provided that this additional service be provided through the satellite airports in the Los Angeles metropolitan area, including Hollywood-Burbank Airport. The Mayor and City Council of Burbank expressly requested and supported this award of additional air service at Hollywood-Burbank Airport.

17. Hollywood-Burbank Airport is included in the National Airport Plan promulgated by the Adminis-

trator of the Federal Aviation Administration (hereinafter "FAA") pursuant to the Federal Airport Act of 1946, Ch. 261, 60 Stat. 170.

18. Hollywood-Burbank Airport has two principal runways for the operation of aircraft. These runways are designated by their compass heading in tens of degrees.

(a) The "north-south" runway is situated on an axis of 330° - 150° . This runway is designated Runway 33 when it is used by aircraft taking off to the northwest or landing from the southeast, and, Runway 15 when it is used by aircraft landing from the northwest or taking off to the southeast. Approximately 2,050 feet of the northernmost portion of this runway lie in the City of Los Angeles on land owned by the United States Government.

(b) The "east-west" runway is situated on an axis of 070° - 250° . This runway is designated Runway 7 when it is used by aircraft landing from the west or taking off to the east, and Runway 25 when it is used by aircraft landing from the east or taking off to the west. Approximately 2,250 feet of the westernmost portion of this runway lies on land owned by the United States Government.

(c) Aircraft landing on Runways 7 and 15 and aircraft departing on Runways 25 and 33 do not overfly the City of Burbank.

19. Prior to the commencement of operations involving jet aircraft landings and takeoffs on the two runways at Hollywood-Burbank Airport, a determination was made by the FAA that such use of each

runway would not be unsafe either to persons or property on the ground or to persons and property in the air.

20. In 1969 there were approximately 32,000 air carrier movements at Hollywood-Burbank Airport serving 1,178,000 commercial passengers in interstate and intrastate transportation. Approximately 97% of these operations were conducted by pure jet aircraft.

21. No air mail is presently carried to or from the Hollywood-Burbank Airport by any air carrier utilizing the airport's facilities.

22. No all-cargo flights are presently operated from the Hollywood-Burbank Airport, although such flights have been operated from the Airport in the past.

23. The following types of pure jet commercial aircraft operate from the Hollywood-Burbank Airport: Boeing 727, Boeing 737, Douglas DC-9. The Administrator of the FAA has issued a type certificate covering each of these types of aircraft. Said type certificates provide that the type to which issued meets the airworthiness requirements of the Federal Aviation Regulations. The following types of pure jet business aircraft operate from the Airport: Jetstar, Gulfstream II, Sabreliner, Lear Jet, DeHavilland and Falcon. Comparable type certificates and airworthiness certificates are required by law in order to operate these business aircraft in air commerce.

24. Each scheduled interstate carrier that uses Hollywood-Burbank Airport holds a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board (hereinafter "CAB"). The certificates issued to Air West and Continental provide that said carriers are authorized to engage in air transport-

ation with respect to persons, property and mail over specified routes into and out of Hollywood-Burbank Airport.

25. Each scheduled interstate air carrier that uses Hollywood-Burbank Airport holds an Air Carrier Operating Certificate issued by the Administrator of the FAA. Said certificates specify that each of said carriers is properly and adequately equipped and able to conduct a safe operation as an air carrier of persons, property and mail in scheduled air transportation between the points authorized in the air carrier's certificate of public convenience and necessity.

26. PSA holds a Commercial Operating Certificate issued by the Administrator of the FAA, which certificate provides that PSA is authorized to operate as a commercial operator to conduct common carrier operations carrying passengers and cargo intrastate on a scheduled basis. PSA holds a Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission.

27. The Administrator of the FAA has issued Operations Specifications to each regularly scheduled air carrier that uses Hollywood-Burbank Airport. Said Operations Specifications provide that each carrier is required to operate turbojet aircraft within the navigable airspace of the United States in accordance with instrument flight rules. The Operations Specifications issued to Air West and Continental provide that said carriers are authorized to use Hollywood-Burbank Airport as a regular airport; the Operations Specifications issued to United and Western provide that said carriers are authorized to use Hollywood-Burbank Airport as an alternate airport. The operations conducted by

each scheduled carrier at Hollywood-Burbank Airport are specifically authorized by each carrier's Operations Specifications.

28. Air West operates Douglas DC-9 aircraft at Hollywood-Burbank Airport. United has operated and operates the following types of aircraft at Hollywood-Burbank Airport: Boeing 727 and Boeing 737. Western operates and has operated Boeing 737 aircraft at Hollywood-Burbank Airport. PSA operates the following types of aircraft at Hollywood-Burbank Airport: Boeing 727, Boeing 737 and Douglas DC-9.

29. Each aircraft operated by the regularly scheduled carriers that use Hollywood-Burbank Airport has been issued an Airworthiness Certificate by the Administrator of the FAA which certifies that, as of the date of issuance, the aircraft to which issued has been inspected and found to conform to the Type Certificate therefor and to be in condition for safe operation.

30. Each pilot of a civil aircraft of United States registry operated in the navigable airspace of the United States is required to have in his personal possession a current pilot certificate issued by the Administrator of the FAA.

31. Each pilot of an aircraft operated by a scheduled air carrier at Hollywood-Burbank Airport is required to hold a current air transport pilot certificate issued by the Administrator.

32. Each flight engineer of a civil aircraft of United States registry is required to have in his personal possession a current flight engineer's certificate issued by the Administrator.

33. Pursuant to newly enacted federal legislation, Hollywood-Burbank Airport is required to apply for

and obtain an Airport Operating Certificate issued by the Administrator of the FAA pursuant to Section 51-(b) of the Airport and Airway Development Act of 1970, Public Law 91-258, 84 Stat. 219 (May 21, 1970), within two years from the date of enactment in order to continue to serve air carriers certificated by the CAB. Management of Lockheed intends to apply for such a certificate under the regulations to be issued by the Administrator governing application.

34. The FAA exercises centralized management and control over the navigable airspace of the United States. The various Air Route Traffic Control Centers operated by the FAA throughout the United States are assigned responsibility for the management and control of the entirety of this navigable airspace.

35. The Los Angeles Center, located at Palmdale, California, exercises management and control of the airspace in a geographical area of approximately 184,000 square miles which is bounded on the south by the border between the United States and Mexico, on the east by the Colorado River, and which extends to mid-California to the north and 150 miles to sea to the west.

36. Pursuant to a license agreement with Lockheed, the FAA operates the Airport Traffic Control Tower and Radar Approach and Departure Control at Hollywood-Burbank Airport.

37. In connection with such operation, the FAA has expended approximately \$2 million on the installation of navigational aids at Hollywood-Burbank Airport, including the Instrument Landing System ("ILS"), runway approach and identification lights, and radar and radio equipment.

38. The Los Angeles Center has subdelegated control over a portion of its navigable airspace, which portion is for this purpose defined geographically and vertically, to the FAA terminal facility located at Hollywood-Burbank Airport.

39. Pursuant to the Federal Aviation Act of 1958, 49 U.S.C. §1301, *et seq.*, the Administrator of the FAA has determined that there exists a need for a system that will provide adequate separation between and orderly control of the air traffic emanating from points within and without the United States and converging on large metropolitan areas and airports, such as Hollywood-Burbank Airport. Accordingly, the Administrator has established a system for the control of air traffic which provides for such orderly control and separation, and which operates within controlled airspace identified as "control zones" and "control areas". Control zones encompass all the airspace from the surface to infinity within five miles of the geographical center of an airport. Control areas are of varying elevations and dimensions, and include the area surrounding Hollywood-Burbank Airport. The airspace within a control zone below an altitude within 2,000 feet above the surface is defined as the airport traffic area.

40. Hollywood-Burbank Airport is located under a control area, within an airport traffic area, within a control zone and under many converging Federal airways, all of which have been established by the Administrator of the FAA pursuant to statutory authority.

41. Unless otherwise authorized by FAA Air Traffic Control, a pilot operating within an airport traffic area must maintain two-way radio communication with the control tower. He is further required to comply

with all clearances and instructions that may be issued by Air Traffic Control. Air traffic control over the aircraft within the Hollywood-Burbank Airport Control Zone, including approach control and departure control, is exercised by FAA personnel located in the control tower situated at the airport. Except when in direct communication with the control tower, each regularly scheduled air carrier is required by its Operations Specifications to operate its jet aircraft in accordance with FAA Instrument Flight Rules ("IFR"). When not under the control of an FAA airport control tower, aircraft operating under IFR are under the direct control of an FAA Air Route Traffic Control Center and are required to comply with the clearances received from that facility.

42. No aircraft may taxi at or take off from Hollywood-Burbank Airport without first receiving an appropriate clearance from Hollywood-Burbank Air Traffic Control. Prior to takeoff, pilots of aircraft that are required to operate under IFR must file their flight plans with the Los Angeles Air Route Traffic Control Center. Every fifteen minutes the FAA computer located at the Los Angeles Center provides updated flight departure information to the appropriate tower facilities and to sectors within the Center. When a commercial jet aircraft is ready for departure from its terminal gate, it makes radio contact with FAA Air Traffic Control. It is at that time assigned a runway for takeoff and is ultimately given clearance to taxi thereto. Prior to taking its position on the runway, the aircraft is given a departure clearance, which includes the assignment of departure procedures and assignment of a radio beam intersection to which the aircraft is directed to fly.

43. On receiving its clearance to take off, each jet or other large aircraft is required to conform with all FAA takeoff procedures and to climb to an altitude of 1,500 feet above the airport surface as rapidly as practicable. Departure clearances for IFR aircraft incorporate standard instrument departure procedures established for Hollywood-Burbank Airport by the FAA. Pictorial charts showing these standard instrument departure procedures in effect at Hollywood-Burbank Airport are published by the Department of Commerce, United States Coast and Geodetic Survey. Aircraft taking off from Hollywood-Burbank Airport must conform with the assigned FAA departure clearance including all standard IFR departure procedures incorporated therein. Control of aircraft crossing the boundary of the airport on takeoff is passed to Hollywood-Burbank Departure Control, which controls the aircraft and provides separation from other aircraft until the departing aircraft is ready to leave the air space subdelegated to the Hollywood-Burbank terminal facility.

44. As an aircraft departs the airspace subdelegated to the Hollywood-Burbank terminal facility destined, for example, for San Francisco International Airport, control of the aircraft is passed from Hollywood-Burbank Departure Control to the Los Angeles Air Route Traffic Control Center located at Palmdale, California. At about Paso Robles, California, control of the aircraft is passed on to the Oakland Air Route Traffic Control Center, which in turn passes control to the FAA terminal facility at San Francisco International Airport as the aircraft enters the navigable airspace subdelegated to that facility. The aircraft then remains under the control of the San Francisco facility until the aircraft has landed.

45. On entering and operating within the Hollywood-Burbank Airport Traffic Area, jets and other large aircraft must be operated at an altitude of at least 1,500 feet except when further descent is required for a safe landing. No aircraft may be landed at Hollywood-Burbank Airport without first receiving an Air Traffic Control clearance, which includes assignment by the FAA of a runway for landing. In addition to exercising approach control, the FAA maintains and operates an Instrument Landing System ("ILS") which electronically establishes a three-degree glide slope to Runway 7 at Hollywood-Burbank Airport. Each of the aircraft operated by the regularly scheduled air carriers is equipped with electronic devices that monitor the ILS glide slope and depict the glide slope position in relation to that of the aircraft on the cockpit instrument.

46. On receiving FAA clearance to approach for landing, the aircraft is required to be at or above the glide slope at the outer ILS marker and to remain at or above the glide slope until reaching the middle ILS marker. The outer marker is located approximately 6.1 nautical miles from the approach end of Runway 7, while the middle marker is located approximately 1.8 nautical miles from the approach end of the runway. The glide slope altitude at the outer ILS marker is approximately 2,000 feet above the surface and at the middle marker is approximately 575 feet above the surface. As an additional means of approach control, the FAA prescribes standard instrument approach procedures which are published in Part 97 of the Federal Aviation Regulations. Pictorial approach and landing charts showing these standard instrument approach procedures in effect at Hollywood-Burbank Airport are

published by the Department of Commerce, United States Coast and Geodetic Survey. Approaches to Hollywood-Burbank Airport conducted under instrument flight rules are required to be in accordance with the standard instrument approach procedures set forth in Part 97 of the Federal Aviation Regulations.

47. During every portion of an IFR flight, the aircraft and pilot are operating under explicit instructions and control of an FAA facility.

48. The navigable airspace in the vicinity of major air terminals across the United States, including Los Angeles, is presently congested. This congestion has resulted in extensive delays at a number of the major airports. This condition exists because the services required by the American traveling public frequently exceed the capacity of the nation's airport system.

49. In exercising centralized management and control over the navigable airspace of the United States, the FAA has as one of its goals the efficient use of such airspace, which includes the expeditious movement of aircraft. The goal of efficient use of airspace, although related, is separate and distinct from the goal of insuring the safety of aircraft.

50. The FAA exerts its power to achieve efficient use of navigable airspace in a variety of ways, including the utilization of flow control procedures and high density airport rules.

51. Flow control is a means of metering aircraft in order to meet any given traffic condition. Flow control restrictions are imposed by FAA facilities from time to time on commercial, business and other aircraft in order to minimize delays resulting from congestion or weather or equipment problems and to accommodate safely the maximum number of aircraft within the Air

Traffic Control System. A flow control restriction regulates the number of aircraft that can be accepted within an area and may restrict altitudes and/or routes to be flown during a specified period of time. When an FAA terminal facility or tower encounters a condition which will result in airborne delays of 30 minutes or more, the facility notifies its Air Route Traffic Control Center of this fact. The Center, in turn, will impose a flow control restriction on adjacent Centers. A flow control restriction obligates the receiving center to (a) clear aircraft on specified routes; (b) establish a separation in time, altitude or distance; or (c) limit the number of departures in a given period by holding aircraft on the ground. Thus the imposition of a flow control restriction by San Francisco can and does result in the Los Angeles Center's holding aircraft on the ground at Hollywood-Burbank Airport.

52. In 1970 the FAA instituted a system of centralized flow control. This system is managed by the FAA Central Flow Control Facility located at Washington, D.C. The Central Flow Control Facility coordinates and supervises the flow of air traffic throughout the Air Traffic Control System to minimize en route delays and achieve the maximum utilization of the air space. Under the new centralized flow control system, prior to imposing a flow control restriction, an Air Route Traffic Control Center must clear the proposed restriction through the Central Flow Control Facility in order to insure that proper coordination may take place within the system.

53. To provide relief from excessive delays caused by congestion at certain of the major airport terminals in the United States, the FAA prescribed High Density Traffic Airport Rules in December 1968, 33 F.R.

17896. These rules, as amended, are presently in effect. These rules designate John F. Kennedy, La Guardia, Newark, O'Hare and Washington National airports as high density traffic airports and restrict the hourly number of IFR operations (takeoffs and landings) at these airports to a specified number. The total number of IFR operations is allocated among various classes of users, namely scheduled air carriers, scheduled air taxis, and general aviation which includes business aircraft. Although the number of operations allowed varies during different periods of the day, the rules allocate operations for the entire twenty-four hour period. To operate to or from these designated airports, aircraft are required to have an arrival or departure reservation. These rules are intended by the FAA to work in conjunction with flow control procedures described in Paragraph 51.

54. Congress and the Administrator of the FAA are fully cognizant of the problems created by aircraft noise. In allocating the IFR reservations in the High Density Traffic Airport rules, the Administrator specifically had in mind the problem of the noise disturbance that would result from encouraging the scheduling of more flights after the hour of 10:00 P.M.

55. In the interest of alleviating noise disturbances to the residents of communities adjoining airports located in metropolitan areas, the Administrator of the FAA has established regulations that (1) require turbine powered fixed wing aircraft, approaching for landing, to maintain within the airport traffic area an altitude of at least 1,500 feet above the surface of the airport "until further descent is required for a safe landing", and (2) require such aircraft, when taking off, to climb to 1,500 feet as rapidly as practicable.

56. On September 4, 1969, acting pursuant to the authority of FAA Order 7100.13, the FAA Chief of the Airport Traffic Control Tower, Burbank, California issued an order (BUR. 7100.5B) prescribing a noise abatement runway use program at the Hollywood-Burbank Airport. This order makes Runway 25 the preferential runway for departures of turbine powered aircraft between the hours of 11:00 P.M. and 7:00 A.M. The preferential runway is assigned by the FAA control tower during these hours by incorporation into an aircraft's departure clearance as an instruction to the pilot. This order designating a preferential runway was a noise abatement measure for the benefit of the City of Burbank. In issuing this order, said FAA Chief took in hand the subject matter of nighttime takeoffs, and, based upon his authority and expertise, acted to minimize the noise consequences of such operations. However, in the landlocked, thickly populated area in which the Hollywood-Burbank Airport is located, the use of a preferential noise abatement runway is helpful in reducing noise over the City of Burbank, but such use merely diverts the noise to other populated areas.

57. Where possible, the FAA has developed standard instrument departures which are assigned between the hours of 11:00 P.M. and 7:00 A.M. in order to reduce noise over residential areas during those hours. Such standard departures are presently in effect at Los Angeles International Airport. In the event that one of these standard departures is not designated in the flight plan filed for a departing aircraft, such departure will be assigned during the indicated hours by incorporation into the aircraft's departure clearance as an instruction to the pilot.

58. The federal statutes and regulations and the orders of the Civil Aeronautics Board and of the Ad-

ministrator of the Federal Aviation Administration have so completely occupied the field of the regulation of the use of the navigable airspace and aircraft operations as to demonstrate that Congress left no room for local regulation such as the Burbank curfew ordinance.

59. Aircraft have such a range and such speed and they involve such technical complexity that they have to be managed on a centralized basis. The transport aviation industry is unique and must be regulated on a national basis, both technically and economically, by the Federal Government. The approach to the solution of air transportation problems at the local level does not work. Regulation on a national basis is required because air transportation is a national operation.

60. The federal statutes and regulations governing and controlling the use of air space and air traffic touch a field in which the federal interest is so dominant as to preclude enforcement of a local ordinance such as the Burbank curfew ordinance.

61. From February 1968 until July 12, 1970, PSA operated a Boeing 727 aircraft which departed the Hollywood-Burbank Airport at 11:30 P.M. each Sunday night destined for San Diego. On the average said flights served about 125 passengers, with an average of 80 being boarded at Hollywood-Burbank. At the time of the imposition of the Burbank curfew ordinance, this was the only regularly scheduled flight taking off from Hollywood-Burbank Airport between the hours of 11:00 P.M. and 7:00 A.M. This was an intrastate flight originating in Oakland, California with its final destination San Diego, California. Both PSA and the traveling public were inconvenienced by the

required cancellation of this regularly scheduled commercial flight.

62. Since March 9, 1970 PSA has operated a Boeing 727 or Boeing 737 aircraft on charter to Lockheed California Company which aircraft departs from the Hollywood-Burbank Airport Monday through Friday at 6:40 A.M. destined for Palmdale. This flight is being permitted to operate by the City as an emergency flight.

63. Several fleets of corporate jet aircraft use Hollywood-Burbank Airport as their home base. Prior to the enactment of the curfew ordinance, there were at least three flights per week of corporate jet aircraft during the now-proscribed curfew period.

64. Lockheed Aircraft Corporation operates and maintains military defense plant facilities at Hollywood-Burbank Airport.

65. On August 29, 1970, Continental Air Lines commenced regularly scheduled service to Portland and Seattle from the Hollywood-Burbank Airport pursuant to authority granted May 12, 1970, by the Civil Aeronautics Board. These flights are operated utilizing Boeing 727-200 aircraft. In scheduling its flights along this route, Continental did not provide any departures within the Burbank curfew hours.

66. Should sufficient demand develop Continental anticipates adding another flight from the Pacific Northwest through the Hollywood-Burbank Airport. Such an additional flight would normally be added to depart from Seattle at about 8:00 P.M. in order to provide an even service pattern—morning, noon, dinner-time and after-dinner flights—throughout the day. The Burbank curfew ordinance, however, would restrict Continental from operating a southbound flight depart-

ing at that hour. A southbound flight from Seattle through Portland and San Jose, California, to Burbank and on to Ontario can depart Seattle no later than 7:00 P.M. in order not to violate the Burbank curfew.

67. If an 11:00 P.M. to 7:00 A.M. curfew on jet departures were to be enforced at Portland as well as at Burbank, Continental would be restricted from originating flights northbound and southbound along this Ontario-Burbank-San Jose-Portland-Seattle route between the hours of 7:00 P.M. and 7:00 A.M. Only 12 hours of the day would be available for originating such flights.

68. In the event of nationwide imposition of curfew ordinances, Continental would be able to originate departures eastbound on its route from Seattle through Denver, Wichita, Tulsa and Houston to New Orleans only between the hours of 7:00 A.M. and 2:00 P.M. On its Los Angeles through Denver to Chicago route, Continental would be able to originate departures eastbound only between the hours of 7:00 A.M. and 4:15 P.M. The available hours indicated do not take into account any allowance that would have to be made for the delayed arrival problem that would inevitably arise.

69. The problem of noise created by jet aircraft is well known, and it appears that if a curfew ordinance such as that before this Court were held valid, similar ordinances would be adopted by virtually all cities surrounding airports. A curfew ordinance cannot be considered solely in the accident of its particular circumstances because past experience indicates that such local legislation is highly contagious and that its spread to other localities is virtually inevitable if the curfew ordinance at Hollywood-Burbank is upheld.

70. The imposition of curfew ordinances on a national basis would have a near catastrophic effect on the national air transportation system, adversely affecting the aviation industry, members of the traveling public, and the national economy.

71. Continental Air Lines has 48 departures per day on its September 1970 schedule that fall within the curfew hours. If curfew ordinances were instituted on a nationwide basis, Continental would have to cancel all of these flights and would have to cancel flights during non-curfew hours as well because of the problem of positioning aircraft for return flights. These required cancellations would involve approximately 15% of Continental's domestic aircraft miles flown per day.

72. The required cancellation of Continental's night services would greatly inconvenience the traveling public as well as business and industry. Reduced rates on night flights enable many members of the public to travel by air at that time, and the largest proportion of Continental's air mail and air freight is carried at night. To replace the cancelled night services, Continental would have to purchase approximately six new Boeing aircraft at a cost of between \$5,000,000 and \$7,000,000 each. Continental's operating costs would be increased approximately 25% by reason of the reduced utilization of aircraft and the required purchase of additional equipment. These costs would be passed on to the traveling public.

73. There is reason to believe that the imposition of a nationwide curfew would affect the other certificated air carriers in a manner and to an extent comparable to the effects upon Continental described in Findings 71 and 72.

74. The Burbank curfew ordinances became effective on May 4, 1970. Between the hours of 11:00 P.M. (local time) on May 4, 1970, and 6:59 A.M. on May 5, there were 1,009 scheduled departures of pure jet aircraft operated by federally certificated air carriers from all airports in the United States. (International departures and departures by scheduled intrastate carriers and commuter air carriers are not included in this total and would increase the indicated number.) If curfew ordinances such as that before this Court were instituted on a nationwide basis, all of these flights would have to be cancelled. These cancellations would create positioning problems for the airlines, which would result in additional cancellations of flights during non-curfew hours.

75. The scheduling of aircraft is an extremely complex operation. Public convenience must be balanced with equipment and crew availability. In addition, schedules of the various airlines are interrelated due to the need to provide connecting flights. For example, approximately 30% of Continental's domestic business comes from providing connections with other airlines.

76. The scheduling operation is made more complex by the maintenance requirements of the air fleet. Hundreds of component parts must be maintained on a timed basis. The aviation industry performs the required maintenance on its aircraft at night at a limited number of maintenance bases. Continental, for example, has its major maintenance facility at Los Angeles International Airport. Continental's schedules are worked out so that an aircraft can return to this facility every day or two for maintenance. United Air Lines has six maintenance bases, and 12% of its fleet receives required maintenance every night. The imposition of

curfew ordinances on a nationwide basis would severely impair the efficiency of the maintenance system within the aviation industry by requiring the carriers to establish additional maintenance bases, which would involve more equipment and personnel at considerable increases in operating costs.

77. If curfew ordinances were imposed on a nationwide basis, the federally certificated carriers would be required to engage in extensive rescheduling of existing flights. This rescheduling would cause enormous inconvenience and expense to the air carriers and would result in a deterioration in air transportation services to the public.

78. The imposition of curfew ordinances on a nationwide basis would result in a bunching of flights in those hours immediately preceding the curfew. This bunching of flights during these hours would have the twofold effect of increasing an already serious congestion problem and actually increasing, rather than relieving, the noise problem by increasing flights in the period of greatest annoyance to surrounding communities. Such a result is totally inconsistent with the objectives of the federal statutory and regulatory scheme.

79. Based upon a study made at four major airports, it appears that over 48% of the nation's air mail is presently carried by flights departing between the hours of 11:00 P.M. and 7:00 A.M. The imposition of a departure curfew on a nationwide basis would thus cause at least a one-day delay in the delivery of billions of pieces of mail transported annually.

80. The air cargo industry virtually depends for its existence on its ability to operate at off-peak hours.

In large measure, the freight is assembled and loaded between the hours of midnight and 2:00 A.M. and then transported in flights departing in the early morning for distribution at the start of the business day. A study made in 1966 for the Aviation Development Council in New York showed that approximately 42% of the all-cargo services operated by certificated carriers would have to be cancelled if curfew ordinances were instituted on a nationwide basis.

81. Such cancellation would have drastic effects on the business community. For example, most of the cancelled checks that move throughout the country go through the New York Clearing House in one way or another. These checks are brought in by air freight. Because of air freight and because of its ability to move at night, these checks go through the clearing house the following morning. In 1965, according to the study made for the Aviation Development Council, this meant a saving in bank interest of \$34,000,000 per year. Today such saving would be close to \$100,000,000 per year. In addition, the ability to ship parts by air freight has allowed many businesses to effect significant savings by the elimination of large parts inventories formerly maintained at warehouses located throughout the country. This advantage would be lost to companies and their customers if air freight could not move at night.

82. The imposition of curfew ordinances on a nationwide basis would cause a serious loss of efficiency in the use of the navigable airspace. The limitation on the time available for use of the airspace resulting from such imposition would seriously interrupt and impede the carriage of interstate passengers and goods and

would conflict with the federally certificated rights and obligations of the air carriers.

83. The evidence is uncontradicted that air commerce, by reason of its speed and volume, requires a single authority if it is to be conducted with maximum safety and so as to achieve efficient use of the navigable airspace.

84. If the use of the navigable airspace were curtailed through the enactment of curfew ordinances on a nationwide basis, interstate commerce would be subjected to an unreasonable burden and interference.

85. Any conclusion of law hereinafter recited which should be deemed a finding of fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter of the action by virtue of 28 U.S.C. §1331(a) and 28 U.S.C. §1337; and jurisdiction over the parties.

2. This action arises under the Federal Aviation Act of 1958, 72 Stat. 737 (1958), as amended, 49 U.S.C.A. §§1301-1542; the Department of Transportation Act, 80 Stat. 931 (1966), 49 U.S.C. §§1651-1659 (Supp. IV 1969); the Airport and Airway Development Act of 1970, Public Law No. 91-258, 84 Stat. 219 (May 21, 1970); the Constitution of the United States, Article I, Section 8, Clause 3 (the Commerce Clause), and Article VI, paragraph 2 (the Supremacy Clause). The matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs. The allegations of the complaint raise issues constituting an actual controversy concerning which the Court pursuant to 28 U.S.C. §2201, et seq., will make a declaration of rights.

3. All defendants reside in, and the claim arose in, this Judicial District.

4. The Federal Aviation Act of 1958, 72 Stat. 737 (1958), as amended, 49 U.S.C.A. §§1301-1542 (hereinafter the "Act"), established the Federal Aviation Agency, now the Federal Aviation Administration ("FAA"), headed by an Administrator who is made responsible under the Act for the exercise of all powers and the discharge of all duties of the FAA.

5. The Act vests in a single Administrator plenary authority for all aspects of airspace management and specifically charges the Administrator with the dual responsibility of insuring the safety of aircraft and the efficient utilization of the navigable airspace.

6. The comprehensive character of the Act demonstrates that Congress intended to provide the Administrator with the tools necessary to exercise his plenary authority. The United States is declared "to possess and exercise complete and exclusive national sovereignty in the airspace of the United States," 49 U.S.C. §1508(a). Having granted to each citizen of the United States "the right of freedom of transit through the navigable airspace of the United States," 49 U.S.C. §1304, Congress further defined "navigable airspace" as all airspace "above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in takeoff and landing of aircraft." 49 U.S.C. §1301(24).

7. The Act conferred upon the FAA and upon its Administrator broad powers to regulate air commerce in the "public interest." 49 U.S.C. §§1303, 1341(a), 1348. The "public interest" is defined to include "the regulation of air commerce . . . to best promote its

development and safety and fulfill the requirements of national defense"; "the control of the use of the navigable airspace of the United States . . . in the interest of safety and efficiency"; "the development and operation of a common system of air traffic control and navigation for both military and civil aircraft." 49 U.S.C. §1303.

8. The powers granted by the Congress are not dormant but have been actively exercised. The regulations of the Administrator are of formidable proportions, impressive detail, and manifest sophistication.

9. The high density traffic airport rules, 14 C.F.R. 93.121-131, which regulate the number of IFR operations at certain major air terminals over the entire 24-hour period of the day, constitute control of the use and management of the navigable airspace by the Administrator to the end of insuring the efficient utilization of such airspace.

10. The system of flow control instituted by the FAA, under which aircraft can be held on the ground in order to reduce airborne delays and congestion, constitutes control of the use and management of the navigable airspace in accordance with the mandate of the Act, which is to insure the efficient utilization of such airspace.

11. To buttress the authority of the Administrator to deal with the question of noise abatement, in 1968 Congress amended the Act to require the Administrator to prescribe such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise.

12. FAA Order BUR 7100.5B, which establishes Runway 25 as the preferential runway at Hollywood-Burbank Airport for departures of turbine powered

aircraft between the hours of 11:00 P.M. and 7:00 A.M., constitutes regulation by the FAA on the subject of noise abatement.

13. An ordinance such as Burbank's cannot be considered solely in the accident of its particular circumstances, but must be weighed and tested as if imposed on a nationwide basis.

14. From the broad scope of the Federal statutes and regulations governing and controlling the use of air space and of air traffic, it is apparent that Congress intended to centralize full and dominant control of the navigable air space in the Federal Government so as to provide for the safe and most efficient use of such airspace. The scheme of federal regulation is so pervasive as to demonstrate that Congress intended to preempt the field and to leave no room for local ordinances such as the Burbank curfew ordinance.

15. Air transportation calls for a more penetrating, uniform, and exclusive regulation than is necessary for any other mode of transportation. It is a uniquely national operation in which the federal interest is so dominant as to preclude the enforcement of state or local laws, such as the Burbank Curfew Ordinance, on the same subject.

16. There would be a very serious loss of efficiency, and the statutory objective of efficient use of the airspace as set forth in the Act would be compromised, as a result of nationwide imposition of curfews such as that imposed at Hollywood-Burbank Airport, and accordingly, the City of Burbank has no power to enact the ordinance in issue in this case.

17. Each federally certificated air carrier is authorized and obligated by statute and by its Certificate

of Public Convenience and Necessity to provide adequate service over its specified routes. Certificates of Public Convenience and Necessity held by the interstate air carriers cannot be revoked unless the carrier fails to comply with an order of the CAB requiring obedience to a federal rule found to have been violated. The Burbank curfew ordinance, by imposing a local veto for a period of hours over use of the navigable airspace, constitutes a restriction on carriers in fulfilling their statutory duty and is tantamount to a partial suspension of the Certificates of Public Convenience and Necessity issued to interstate air carriers operating out of Hollywood-Burbank Airport. Said ordinance is therefore in direct conflict with federal law and is void under the Supremacy Clause (Art. VI, Para. 2) of the United States Constitution.

18. The Burbank curfew ordinance conflicts with the exercise of federal sovereignty over navigable airspace, 49 U.S.C. §1508(a), by imposing local control on its use, and, for the same reason, the ordinance conflicts with the federal right of each citizen of freedom of transit through the navigable airspace, 49 U.S.C. §1304, and is therefore void under the Supremacy Clause.

19. Under the Commerce Clause (Art. I, §8, Cl. 3) of the United States Constitution, the states are not deemed to have authority (a) to impede substantially the free flow of commerce from state to state, or (b) to regulate those phases of the national commerce, which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.

20. The nationwide imposition of ordinances such as Burbank's would seriously interrupt the carriage of

interstate passengers, mail, and goods and thereby substantially impede the free flow of commerce from state to state, and, considered on such a national basis, such ordinances could not stand.

21. The volume of air commerce, the speed with which it is conducted, the technical complexity of its scheduling and operation, and the limited availability of such of its essential aspects as airports, aircraft, air traffic routes, and aircraft maintenance facilities all make national uniformity of regulations prescribed by a single authority a necessity, so that this phase of the national commerce may be conducted with maximum safety and so as to achieve efficient use of the navigable airspace.

22. Plaintiffs and intervening plaintiff are entitled to judgment on their respective complaints for declaratory relief that each and every part and section of the Burbank curfew ordinance is unconstitutional, illegal and void.

23. Plaintiffs and intervening plaintiff are entitled to a decree that defendant City of Burbank and the individual defendants, and each of them, in their respective capacities as officials of the City of Burbank charged with the enforcement of the provisions of the Burbank curfew ordinance, their respective agents, servants, employees, attorneys and successors be enjoined and restrained by a permanent order of injunction of this Court from taking any action in pursuance of said ordinance.

24. Plaintiffs and intervening plaintiff are entitled to recover their costs of suit herein incurred.

25. Any finding of fact which should be deemed a conclusion of law is hereby adopted as such.

**LET JUDGMENT BE ENTERED ACCORDING-
LY.**

Dated this 30th day of November, 1970.

**/s/ E. Avery Crary
United States District Judge**

Submitted by:

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**RECEIPT ACKNOWLEDGED this 25th day of
November, 1970, at 4:00 p.m.**

**SAMUEL GORLICK, City Attorney, and
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By /s/ Richard L. Sieg, Jr.

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Richard L. Sieg, Jr.

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APPENDIX E.

In the Matter of the Petition of Jordan A. Dreifus.

**United States of America
Federal Aviation Administration
Department of Transportation
Washington, D. C.**

In the matter of the petition of Jordan A. Dreifus to amend the Federal Aviation Regulations to prescribe aircraft noise regulations for turbojet aircraft operations at the Santa Monica, California Municipal Airport. Regulatory Docket No. 9071.

DENIAL OF PETITION

By letter dated July 19, 1968, and supporting letters dated September 3, 1968, October 1, 1968, January 27, 1969, March 3, 1969, March 6, 1969, March 18, 1969, and May 24, 1969, Jordan A. Dreifus, on his own behalf, petitioned for rule making to amend the Federal Aviation Regulations to prescribe noise restrictions and limitations for turbojet aircraft operating at the Santa Monica Municipal Airport.

In support of his request, petitioner makes the following arguments (here condensed):

- (1) Petitioner's residence near the airport is becoming exposed to increasing turbojet aircraft traffic and resulting noise.
- (2) Other airport neighbors are suing the airport seeking damages based on aircraft noise.
- (3) The FAA has the authority under section 307 of the Federal Aviation Act to issue noise standards governing the flight of aircraft at the airport.

- (4) New section 611 of the Federal Aviation Act gives the FAA the duty to issue noise standards governing the flight of aircraft at the airport.
- (5) New section 611 of the Federal Aviation Act has probably obliterated all State or local authority to issue such regulations.
- (6) The exclusive jurisdiction of the FAA in the field of aircraft noise abatement was upheld in the case of *American Airlines, Inc. vs. Town of Hempstead*, 272 Fed. Supp. 226 (1966).
- (7) Under Agency Order 7110.13, entitled "Aircraft Noise Abatement Programs," the FAA has instituted voluntary noise abatement procedures for airports including runway use restrictions, air traffic control procedures, and routings where compatible with safety.
- (8) Failure of the FAA to issue restrictions at Santa Monica and other airports would allow the State and local governments to issue their own airport use restrictions. The restrictions would result in chaos, confusion, interference and obstruction to aircraft operations, which could be contrary to the national interest. The local restrictions could be arbitrary, unreasonable, and obscure, and could discriminate against "general aviation" as distinct from interstate commercial carriage or "air transportation." Aside from resulting in litigation, local discrimination against "general aviation" would be contrary to the Federal Aviation Act of 1958.
- (9) Failure of the FAA to issue noise abatement regulations for Santa Monica and other airports would be incompatible with the primary

reason for the Federal Aviation Act of 1958, which was the unification of the control of aircraft operations in a single Federal agency to assure safety and the orderly development of aviation.

(10) State and local noise abatement restrictions would not be effective because of the uncertainty with which they would be met by the courts. Petitioner states that a Santa Monica municipal regulation concerning aircraft noise at the airport was recently declared invalid by a State court.

(11) The FAA has the authority to restrict the use of Washington National Airport.

Petitioner supplements the above arguments with noise exposure data developed by a consulting firm, a reference to noise levels specified in FAA Notice of Proposed Rule Making 69-1, the relationship of these figures to a Santa Monica Airport noise report, and newspaper articles concerning the severity of the airport noise problem.

Petitioner makes two basic requests, (1) a general request to issue any aircraft noise regulations "as may be necessary or appropriate in the circumstances" to relieve the noise burden on the neighbors of the Santa Monica Airport, and (2) a specific request to restrict the hours of operation of turbojet aircraft at the airport, as was attempted by the City of Santa Monica in the ordinance that petitioner states was held invalid by the State Court.

With respect to petitioner's first, general request, the FAA has, in fact, implemented Order 7110.13 (cited by petitioner) with respect to the Santa Monica Air-

port, in cooperation with the City of Santa Monica. This has involved (1) the use of a noise abatement runway when permitted by wind conditions; (2) the use of a noise abatement departure path to avoid congested areas; and (3) the use of raised traffic patterns. In addition, the FAA monitors the conditions at the airport in order to anticipate new noise problems, or possible solutions, at the airport. Further, section 91.87 of Part 91 of the Federal Aviation Regulations prescribes noise abatement approach, departure, and runway requirements that must be complied with by turbine-powered and large airplanes. Beyond these rules, and the FAA's monitoring of the Santa Monica Airport under the FAA Order, the FAA believes that further relief from aircraft noise should involve airport use restrictions similar to those that petitioner states were issued in the Santa Monica City Ordinance. In short, the FAA at present does not know of any action, short of the type attempted by Santa Monica, that will satisfy the needs of the neighbors of the airport or supply the relief requested. In light of the above, petitioner's general request for rule making not of the kind attempted by the City of Santa Monica is hereby denied.

In support of petitioner's specific request for time limitations similar to those attempted by the City of Santa Monica, petitioner states that such rules "would avoid a major area of possible dispute with surrounding residents." The FAA agrees that nondiscriminatory time restrictions may be an effective and appropriate means of adapting aircraft noise to the needs of local communities. Petitioner states that the "final question for consideration is: what level of government has the power to so regulate or restrict aircraft operations? and what level of government *should* be the proper

level to exercise such power?" With regard to the existence of Federal power to substitute its judgment for that of the local governments who own and operate airports, the FAA agrees with petitioner (see petitioner's arguments 3 and 4 above) that the Federal Aviation Act provides broad powers in the field of aircraft noise abatement.

However, with respect to, the question as to which level of government would be the proper one to deny the use of airports to aircraft on the basis of noise considerations (as would be involved in the requested time limitations), the FAA does not agree with petitioner that new section 611 of the Federal Aviation Act has obliterated the authority of State or local government proprietors of airports (see petitioner's argument 5 above). To the contrary, Senate Report 1353, *Aircraft Noise Abatement*, July 1, 1968, (concerning Public Law 90-411, H.R. 3400, July 21, 1968, which added new section 611 to the Federal Aviation Act of 1958) makes the following statement of Congressional intent concerning the relation of the new legislation to local government initiatives, and in so doing adopts *verbatim* views expressed by the Secretary of Transportation in his letter to the Senate Committee Of June 22, 1968. (emphasis supplied):

The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines v. Town of Hempstead*, 272 F. Supp. 226 (U.S.D.C., E.D., N.Y., 1966). The court

said, at 231, 'The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source.' H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. *State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.* However, the proposed legislation will not affect the rights of a State or local public agency, as *the proprietor of an airport*, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners *acting as proprietors* can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft, and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. *The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment*

for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.

The broader policy behind the above quoted letter of June 22, 1968, was earlier stated, in other terms, in the Secretary's letter of March 1, 1968, to the Committee on Interstate and Foreign Commerce of the House of Representatives (emphasis supplied):

Local communities should, if not inconsistent with overriding national interest, have the option to determine the effects of transportation on their environment. . . .

The exercise of this and other authority by local communities should continue. Local communities select airport sites and determine where they best will serve community needs. They bear the responsibility for insuring compatible land use in the airport environs. They have the necessary promotional, proprietary, planning and land use authorities to carry out this responsibility. They have a very influential voice in determining the type of service they want through their appearances in route proceedings before the CAB. *In short, given the limits imposed by aeronautical technology, the community can and should continue to bear a heavy share of the responsibility for assuring the compatibility of the air service they seek and enjoy with the environmental objectives of the community.*

Based on the above guidelines, petitioner's remaining arguments (see above) supporting federally issued time restrictions at the Santa Monica Airport must be answered as follows:

Petitioner's argument 5, stating that new section 611 has probably obliterated all State and local authority to issue such regulations is not correct. While States may not use their police power to regulate in any way the flight of aircraft for noise purposes, State and local governmental proprietors of airports may deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

Petitioner's argument 6, implying that the case of *American Airlines, Inc. v. Town of Hempstead* requires that the FAA issue time limitations for the Santa Monica airport is not supportable. While this case stated that noise limiting rules operating as those of the Hempstead ordinance must come from a Federal source, the material quoted from the Senate Report distinguished such ordinances from the action taken, by airport proprietors, to exclude aircraft, using their airports, because of noise considerations. The Hempstead ordinance was not an action taken by an airport proprietor to exclude aircraft from the airport.

Petitioner's argument 8, describing the adverse effects of local airport use restrictions is not supported by any facts or experience known to the FAA. This form of locally responsive noise control is clearly in the national interest in the light of the quoted portion of the Senate Report. Further, there is no indication that the noise restrictions required by petitioner would be discriminatively applied.

Petitioner's argument 9, covering the unification objective of the Federal Aviation Act of 1958, is correct insofar as it describes the need for a single Federal agency in the field of the safe, orderly development of aviation. However, the Senate Report makes it clear that, just as the FAA recognizes the proprietary interest of airport operators by not requiring an airport to accept service, so it should recognize the proprietary interest of airport operators by not substituting its judgment, so far as acceptance of noisy aircraft by the airport is conceived, for that of the State or local governmental elements that own and operate the nation's airports.

Petitioner's argument 10, covering the uncertainty with which State and local noise rules would be met by the courts, must be answered directly from the congressional intent expressed in the Senate Report: any action that would prevent any public airport proprietor from taking any nondiscriminatory action to exclude aircraft on the basis of noise considerations would appear to conflict with that express congressional intent. In any case, as stated above, the Senate Report states that the Federal Government should not substitute its judgment for that of public airport proprietors on the issue of the service desired by those proprietors and their resulting judgments concerning the locally determined need to accept or exclude aircraft on the basis of noise considerations.

Petitioner's argument 11, concerning FAA authority to restrict operations at Washington National Airport is not valid since the FAA is the proprietor of that airport. Such action by the FAA would not be a substitution of its judgment for that of a state or local governmental proprietor.

Although no FAA regulation concerning the local Santa Monica airport noise problem is appropriate at this time for the reasons mentioned above, it should be noted, as stated in Notice 69-1, that the FAA is studying various types of operating rules for obtaining optimum noise levels around airports, and that, where such study indicates that appropriate rules can be developed, they will be issued as a notice of proposed rule making for public comment.

In consideration of the foregoing, I find that the requested rule making under sections 307 and 611 of the Federal Aviation Act would not be in the public interest and that the institution of rule making is not justified. Therefore, in accordance with sections 11.73 and 11.27 of Part 11 of the Federal Aviation Regulations, the petition of Jordan A. Dreifus for rule making under Sections 307 and 611 of the Federal Aviation Act, respectively, is hereby denied.

/s/ D. D. Thomas

D. D. Thomas

Acting Administrator

Issued in Washington, D. C. on 10 July 1969

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IN THE
Supreme Court of the United States

October Term, 1971
No. 71-1637

THE CITY OF BURBANK, etc., *et al.*,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., *et al.*,

Appellees.

On Appeal From the United States Court of Appeals
for the Ninth Circuit

**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE**

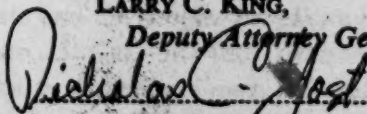
The State of California respectfully asks leave of
the Court to file Amicus Curiae in this cause on be-
half of appellants, *City of Burbank, et al.*

Respectfully submitted,

EVELLE J. YOUNGER,
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JAY L. SHAVELSON,
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Deputy Attorney General,

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Brief of the State of California Amicus Curiae in
Support of the Jurisdictional Statements of Ap-
pellants

INTEREST OF THE AMICUS

The Attorney General of California, as chief law officer, has broad powers derived from the common law, and absent any legislative restriction, has the power to file any civil action which he deems necessary for the protection of public rights and interests. *Pierce v. Superior Court*, 1 Cal. 2d 759, 761-62; *see* California Constitution, Art. V, § 13; Govt. Code §§ 12511, 12600 *et seq.* He may file environmental actions on behalf of the state and the people. *People ex rel. Younger v. El Dorado*, 5 Cal. 3d 480; *California-Oregon Power Company v. Superior Court*, 45 Cal. 2d 858, 871; *People v. Truckee Lumber Company*, 116 Cal. 397, 402.

California's interest in this case is of two kinds: (1) First, there is a state policy against noise pollution,¹ which policy is furthered by ordinances such as that adopted by Burbank to combat such pollution; (2) Second, California has the nation's most comprehensive regulatory plan for combating airport and aircraft noise pollution² which we would not like to see upset

¹Govt. Code § 16000 (b), (c), (d); *also see* Govt. Code §§ 12600, 12605, Public Resources Code § 21001(b).

²Title 4, Calif. Admin. Code §§ 5000-5080.3; *see* Public Utilities Code § 21669 *et seq.* For the convenience of the court we have attached the authorizing statutes as Appendix A and the Noise Regulations for California Airports as Appendix B.

With one exception (Title 4, Calif. Admin. Code §§ 5030-5032, 5035) the California regulations, unlike the Burbank, Cedarhurst, Hempstead, and Audubon Park ordinances (*see* para. IV(B) *infra*), do not directly regulate the aircraft and its noise. Instead, based upon the state's licensing of the proprietor, the regulations are, in their own words "designed to cause the airport proprietor, aircraft operator, local governments, pilots, and the department to work cooperatively to diminish noise." Title 4, Calif. Admin. Code § 5000. These regulations are noise standards for aircraft and aircraft engines for airports operating under a valid permit issued by the department. Sec. 21669; *see* § 21663, Title 4, Calif. Admin. Code § 5000. Elsewhere the purpose of the regulations is stated:

"5010. Purpose. The purpose of these regulations is to provide a positive basis to accomplish resolution of existing noise problems in communities surrounding airports and to prevent the development of new noise problems. To accomplish this purpose, these regulations establish a quantitative framework within which the various interested parties (i.e., airport proprietors, aircraft operators, legal communities, counties and the state) can work together effectively to reduce and prevent airport noise problems."

The regulations do not directly regulate aircraft noise. Instead they provide a framework within which the airport proprietor and other interested parties are to work together to achieve overall noise reduction in the surrounding residential areas. Limitations on airport noise in such residential communities are established. (Title 4, Calif. Admin. Code § 5012.) A noise impact boundary is established (Title 4, Calif. Admin. Code §§ 5006(h), 5013) as is a noise impact area which is the area within the noise im-

by a decision which on its face is directed at one municipal ordinance.

SUMMARY OF ARGUMENT

Noise pollution, particularly that from aircraft noise, is one of the most pervasive environmental threats. A National Environmental Policy is established by recent legislation. Such legislation imposes upon

each airport boundary less than that area deemed to have compatible land use (Title 4, Calif. Admin. Code §§ 5006(i), 5014). The proprietor may not operate his airport with a noise impact area of other than zero unless he has a variance. (Title 4, Calif. Admin. Code § 5062; see § 5075.)

The various interested parties are given a wide variety of means within which to cooperate so as to reduce the noise impact area to zero. None is mandated. The pertinent section is quoted:

"5011. Methodology for Controlling and Reducing Noise Problems. The methods whereby the impact of airport noise shall be controlled and reduced include but are not limited to the following:

"(a) Encouraging use of the airport by aircraft classes with lower noise level characteristics and discouraging use by higher noise level aircraft classes;

"(b) Encouraging approach and departure flight paths and procedures to minimize the noise in residential areas;

"(c) Planning runway utilization schedules to take into account adjacent residential areas, noise characteristics of aircraft and noise sensitive time periods;

"(d) Reduction of the flight frequency, particularly in the most noise sensitive time periods and by the noisier aircraft;

"(e) Employing shielding for advantage, using natural terrain, buildings, et cetera; and

"(f) Development of a compatible land use within the noise impact boundary.

"Preference shall be given to actions which reduce the impact of airport noise on existing communities. Land use conversion involving existing residential communities shall normally be considered the least desirable action for achieving compliance with these regulations."

In brief, the California legislation and regulations do not directly control aircraft noise. Instead, they provide a framework within which the airport proprietor may cooperate with other interested parties to reduce the impact of aircraft noise on people.

state and local governments the primary responsibility of implementing the national environmental policy which provides for enhancement of environmental quality. The City of Burbank implemented the national policy by adoption of an ordinance directed at aircraft-produced noise pollution. Since the local ordinance *implements* the legislatively mandated national policy rather than conflicts with it, the ordinance should be upheld.

ARGUMENT

I

NOISE POLLUTION

Noise pollution, and particularly aircraft noise is one of the most pervasive threats to our environment.² In the words of the California Department of Public Health:

"Noise is ubiquitous in the environment and has many adverse effects on man. It causes hearing loss, interrupts sleep, interferes with speech and generally degrades the quality of life." California Department of Public Health, *A Report to the 1971 Legislature on the Subject of Noise Pursuant to Assembly Concurrent Resolution 165*, 1970, 4 (1971).

The threats to health and welfare occasioned by noise are well established:

"Physicians have reported a causal relationship between exposure to excessive noise over a period of time and the incidence of heart disease and cardiovascular disfunction, migraine headaches, gastrointestinal disorders, and allergies, as well as endocrine and metabolic effects." Hildebrand, *Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research*, 70 Colum. L. Rev. 652, 658 (1970).

Various forms of psychological distress, including irritation and tension-associated ailments, have also been attributed to noise, and particularly to noise which in-

²We note that this court has recently had occasion to render decisions involving air and water pollution. *Washington v. General Motors Corp.*, U.S., 31 L.Ed. 2d 727, S. Ct. (1972); *Illinois v. Milwaukee*, U.S., 31 L.Ed. 712 S. Ct. (1972). See Noise Pollution and Abatement Act of 1970, 42 U.S.C. § 1858 *et seq.*

terrupts or disturbs sleep. See the Mayor's Task Force on Noise Control, *Toward a Quieter City*, 14 (N.Y. 1970). These undesirable consequences of excessive noise may then lead to others, such as economic loss:

"The World Health Organization estimates that lowered efficiency and increased errors caused by noisy working environments result in a loss of \$4 billion per year to American industry. In 1961 a *Time* estimate placed the cost of noise to American industry—for compensation, lost hours, and decreased efficiency—at \$2 million a day." Hildebrand, *supra*, at 653-654.

The worst cause of growing noise pollution is and will be the aircraft.

"[T]he greatest increase in the urban noise level has been brought about by the introduction of the turbojet engine into commercial airline operation." Hildebrand, *supra*, at 652.

To people who reside near airports, aircraft noise "constitutes the principal noise offense. . . ." Department of Public Health, *supra*, at 26. A typical long range, four-engine jet transport on takeoff spreads an unacceptable noise level countour 34,000 feet long and 6,000 feet wide. On landing the same aircraft causes unacceptable noise in a countour 11,000 feet by 1,500 feet. This is a total of approximately eight square miles of land outside the airport being exposed to unacceptable noise levels. *Id.*, at 26-27.

A recent study conducted under the auspices of the City of Los Angeles Department of Planning reinforces this conclusion with special reference to the Los Angeles area:

"[A]ircraft noise . . . will probably become the most pervasive and disturbing source [of urban

noise in the future. [Footnote omitted.] In areas immediately surrounding airports, low-flying aircraft and those taking off, taxiing, and testing engines on the ground generate the most intense and frequent noise in the city. [Footnote omitted.]” Branch and Beland, *Los Angeles City Department of Planning, Outdoor Noise and the Metropolitan Environment—Case Study of Los Angeles with Special Reference to Aircraft*, at 8, 1970.⁴

The degree of annoyance experienced from recurring noise varies according to the time of day. Specifically, such noise at night, when most people want to sleep, is worst. Wyle Laboratories Research Staff, *Supporting Information for the Adopted Noise Regulations for California Airports—Final Report to the Department of Aeronautics* (Report No. WCR 7-3(R), 1971), p. 8.

“Sleep disturbance caused by noise often occurs without the sleeping person’s knowledge. Noise

*The California Legislature has also found the problem of noise to be acute. Government Code section 16000 is quoted in part:

“16000. The Legislature finds that:

“(b) The proliferation of noise from transportation sources have led to the exposure of large sectors of the populace to an unacceptable degree of noise.

“(c) The anticipated rates of construction of new airports and extension of existing airports, construction of freeways and mass rapid transit lines, and the introduction into service of intraurban short takeoff and land and vertical takeoff and land aircraft operating at low cruising altitudes will rapidly escalate the urban noise problem unless systematic preventive measures are taken.

“(d) There is a large discrepancy between the technology available for control of urban noise and the degree to which it is being utilized in practice, through such means as land use planning, noise control provisions in building design and construction, and legal control over the movements of noise-producing transportation vehicles.”

which is not sufficient to arouse the subject may impair the quality of sleep by shifting him from a deeper stage of sleep to a shallower stage, or by depriving him of a sufficient amount of the portion of the sleep period which is connected with dreaming and which is thought to be most important for rest." *Id.*, at 23.

Briefly, noise is a problem, and noise at night is a great problem. The question then arises whether this Nation has acted to cope with such threats to its environment. It has.

II

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 IMPOSES UPON STATE AND LOCAL GOVERNMENTS THE RESPONSIBILITY OF IMPLEMENTING THE NATIONAL POLICY WHICH PROVIDES FOR ENHANCEMENT OF ENVIRONMENTAL QUALITY

A. The National Policy

In 1970 the President signed the National Environmental Policy Act (N.E.P.A.) which has aptly been termed "the most important piece of environmental legislation ever written." California Continuing Education of the Bar, *Environmental Law Handbook*, §4.27, at 123 (1970). (The act appears at 42 U.S.C.A. §§ 4331-4347, Pub. L. 91-190.) N.E.P.A. establishes a national environmental policy. Section 101; 42 U.S.C. § 4331. The policy section is quoted:

"Sec. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new

and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practical means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

“(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

“(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

“(2) assure for all Americans, safe, healthful, productive, and esthetically and culturally pleasing surroundings;

“(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

“(4) preserve important historic, cultural, and natural aspects of our national heritage, and

maintain, wherever possible, an environment which supports diversity, and variety of individual choice;

"(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

"(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

"(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." N.E.P.A. § 101, 42 U.S.C. § 4331.

Three months after enactment of N.E.P.A. Congress passed the Environmental Quality Improvement Act of 1970 to aid its implementation. (The act appears at 42 U.S.C.A. §§ 4371-4374, Pub. L. 91-224.) Here the Congress elaborated upon the national policy:

"Sec. 202. (a) The Congress finds—

"(1) that man has caused changes in the environment;

"(2) that many of these changes may affect the relationship between man and his environment; and

"(3) that population increases and urban concentration contribute directly to pollution and the degradation of our environment.

"(b)(1) The Congress declares that *there is a national policy for the environment which pro-*

vides for the enhancement of environmental quality. This policy is evidenced by statutes heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water and land resources, transportation, and economic and regional development.

"(2) The primary responsibility for implementing this policy rests with State and local governments . . ." (Emphasis added.)

1. Statutory Law Requires That Federal Laws Be Interpreted in Light of the National Environmental Policy

In summary, the National Environmental Policy Act establishes a natural environmental policy. 42 U.S.C.A. § 4331; *see* 42 U.S.C.A. § 4371(b)(1). The "policies, regulations and public laws" of the nation "shall" be interpreted in accordance with the policies of that Act. 42 U.S.C.A. § 4332(1). The Court's responsibility is clear.

So is Burbank's responsibility. With regard to NEPA's policy, the statutes say: "The primary responsibility for implementing this policy rests with State and local governments." 42 U.S.C.A. § 4371(b)(2).

Hence, the Federal Aviation Act must now be interpreted in light of the policy established by the National Environmental Policy Act.

1. Case Law Requires That Federal Laws Be Interpreted in Light of the National Environmental Policy

A. The United States Supreme Court

In remanding another matter involving a transportation element, highways, this Court opened its opinion with the reference designed to put the issue in its proper perspective:

"The growing public concern about the quality of our natural environment has prompted Congress in recent years to enact legislation¹ designed to curb the accelerating destruction of our country's natural beauty." *Citizens to Preserve Overton Park, Inc., et al. v. Volpe, Secretary of Transportation*, 401 U.S. 402, 404, 28 L.Ed. 2d 136, 91 S.Ct. 814 (1971).

B. *The Courts of Appeal*

The Courts of Appeal have been no less reticent in applying the national environmental policy. The Fifth Circuit in *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), applied NEPA and the national environmental policy generally to a pre-existing statutory scheme relative to regulation of dredge and fill operations.

The court stressed that the policy was for all three branches of government to apply:

"The parallel of momentum as the three branches shape a national policy gets added impetus from the National Environmental Policy Act of 1969, Public Law 91-190, 42 U.S.C.A. §§ 4331-4347. This Act essentially states that every federal agency shall consider ecological factors when dealing with activities which may have an impact on man's environment. [Footnote omitted.]" (*Id.*, at 211; also see *Id.* at 200-201, 209, 212-213.)

¹See, e.g., The National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. § 4321 et seq. (1964 ed., Supp. V); Environmental Education Act, 84 Stat. 1312, 20 U.S.C.A. § 1531 et seq.; Air Quality Act of 1967, 81 Stat. 485, 42 U.S.C. § 1857 et seq. (1964 ed., Supp. V); Environmental Quality Improvement Act of 1970, 84 Stat. 114, 42 U.S.C.A. §§ 4371-4374." [Footnote the Court's.]

The first circuit to have been confronted with a case involving the National Environmental Policy Act as the central issue was that for the District of Columbia. In *Calvert Cliffs v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), that court reviewed and remanded certain procedures of the A.E.C. in light of NEPA. (Also see *Conservation Society v. Texas*, 446 F.2d 1013 (5th Cir. 1971).)

Said the court in *Calvert Cliffs*:

"... The sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action."

Id. at 1122.

What the court had to say about the role of the judiciary is not out of place in this case where the Federal Aviation Administration, in suing to invalidate a city's implementation of the Congressionally-declared National Environmental Policy, blythely ignores that policy.

"These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material 'progress.' [Footnote omitted.] But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role. In these cases, we must for the first time interpret the broadest and perhaps most important of the recent statutes: the National Environmental Policy Act of 1969 (NEPA). [Footnote omitted.] We must assess claims that

one of the agencies charged with its administration has failed to live up to the congressional mandate. Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." *Id.* at 1111.

In remanding the matter, the Court of Appeal concluded:

"[W]e require only an exercise of substantive discretion which will protect the environment 'to the fullest extent possible.' No less is required if the grand congressional purposes underlying NEPA are to become a reality." *Id.* at 1129.

In brief, there is now a National Environmental Policy. By the command of both statute and case law, regulations and public laws are now to be interpreted in light of that policy. Specifically, the Federal Aviation Act, which some pre-N.E.P.A. cases appeared to hold as restricting the area left for local government action, must now be interpreted in light of the National Environmental Policy Act and the Environmental Quality Improvement Act which command the state and local governments to implement the National Environmental Policy. Former local noise pollution ordinances were held to conflict with Federal law. The Burbank noise pollution ordinance implements Federal law.

B. Burbank Has Acted to Implement the National Policy

On March 31, 1970, the City of Burbank passed a noise ordinance imposing a jet curfew.

So what do we have?

1. Noise pollution is a problem.

2. Aircraft noise pollution is a problem.
3. Nighttime noise pollution is a greater problem.
4. Congress has declared a national policy against environmental pollutants.
5. Congress has declared that State and local governments bear the primary responsibility for implementing that national policy.
6. The City of Burbank implemented that policy by barring aircraft-produced jet noise pollution at night.

III

CONGRESS HAS NOT PREEMPTED THE FIELD OF AIRCRAFT-PRODUCED NOISE POLLUTION

When the Federal government wants to preempt something, it says so. The very subject now before this court, aircraft-caused pollution, illustrates the point dramatically. In the field of aircraft-produced air pollution there is a clear Congressional directive to preempt. By way of contrast, in the field of aircraft-produced noise pollution there is a clear Congressional attempt not to preempt.

Regarding aircraft-produced air pollution, Congress has said:

"No State or political subdivision thereof may adopt or attempt to enforce any standard respecting emissions of any air pollutant from any aircraft or engine thereof unless such standard is identical to a standard applicable to such aircraft under this part." 42 U.S.C. §1857f-11.

By way of contrast, in the Federal Aviation Act (which includes the regulation of aircraft-produced noise pollution) Congress has said:

"Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at

common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506.

The difference in language makes manifest the difference in Congressional intent.

IV

THE BURBANK ORDINANCE DOES NOT CONFLICT WITH ANY FEDERAL LAW OR REGULATION

A. The Court of Appeals' Holding

Perhaps the most appalling aspect of the Court of Appeals' holding is the suggestion that one rather minor federal bureaucraft can invalidate the duly adopted legislation of a state or the ordinances of a local government. One of the court's two apparent holdings ("The Conflict Issue") is that the City's ordinance is invalid because the tower chief says so. *Lockheed Air Terminal, Inc. v. City of Burbank*, 457 F.2d 667, 675-676 (9th Cir. 1972).

The F.A.A. Chief of the Airport Traffic Control Tower issued a series of runway preference orders. *Id.*, at 669. One of these provided that a particular runway be used as much as possible for turbine take-offs at night. *Ibid.* The tower chief said in his order that this procedure will lower noise "to the lowest practicable minimum. . . ." *Id.*, at 676. [As accurately found by the District Court, this procedure does not end noise but "merely diverts the noise to other populated areas." Finding 56.] The Ninth Circuit then went on to elevate this functionary's noise diversion to such constitutional significance as to invalidate the City's ordinance.

"This assertion represents a considered determination by an authorized representative of the FAA

that measures of the magnitude of that taken by the City of Burbank are beneath the 'lowest practicable minimum.' The municipal curfew ordinance, therefore, interferes with the balance set by the FAA among the interests with which it is empowered to deal and frustrates the full accomplishment of the goals of Congress. [Footnote omitted.] Because of this conflict . . . the Burbank ordinance is unconstitutional, illegal and void." *Lockheed v. Burbank*, *supra*, at 676.

Rarely in the course of legal endeavor has so little been magnified into so much. The local order of a tower chief is ballooned into a "considered determination" of a federal agency of such Constitutional significance as to render a City ordinance "unconstitutional, illegal and void."

Surely this Court had something more substantial in mind when it said that intent to supersede state regulation "is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State." *Huron Cement Co. v. Detroit*, *supra*, 362 U.S. 440, 443, 80 S. Ct. 813, 4 L.Ed. 852 (1960). Here we are not talking about an act of Congress. We are not talking about a regulation adopted at a national agency level.⁶ We are not even talking about a regula-

⁶We note that Title 14, Code of Federal Regulations, Part 93, deals with "Special Air Traffic Rules and Airport Traffic Patterns." There are regulations governing John F. Kennedy International Airport, Floyd Bennett Naval Air Station, the Anchorage, Alaska, Terminal Area, the Phoenix-Litchfield area, the Valparaiso, Florida, Terminal Area; the Portland International Airport Terminal Area, and the following control zones: Atlanta, Ga. (Atlanta Airport); Baltimore, Md. (Friendship International Airport); Boston, Mass. (Logan International Airport); Buffalo, N.Y. (Great Buffalo International Airport); Chicago, Ill. (O'Hare

(This footnote is continued on next page)

tion of regional applicability. We are talking about one tower chief's noise shift rule for two runways.

Besides, the order and the ordinance are not in conflict. Having a preferential runway is in no way in conflict with barring, with exceptions, jet takeoffs. The two rulings (order and ordinance) may be quite compatibly applied so that night jet takeoffs are not permitted except for the exceptions. The exceptions shall take off on the preferential runways.

Surely that is a construction both more harmonious and more in tune with this court's rulings than the elevation of a minor functionary's local order to constitutional ordinance-invalidating, significance.

B. Pre-NEPA Case Law

The issue presented by this appeal is whether a city may enact a noise pollution ordinance (barring night

International Airport); Cleveland, Ohio (Cleveland-Hopkins International Airport); Columbus, Ohio (Columbus Municipal Airport); Covington, Ky. (Greater Cincinnati Airport); Dallas Texas (Love Field); Denver, Colo. (Stapleton Municipal Airport); Detroit, Mich. (Metropolitan Wayne County Airport); Honolulu, Hawaii (Honolulu International Airport); Houston, Tex. (Intercontinental Airport); Indianapolis, Ind. (Wier-Cook Municipal Airport); Kansas City, Mo. (Kansas City Municipal Airport); Los Angeles, Calif. (Los Angeles International Airport); Louisville, Ky. (Standiford Field); Memphis, Tenn. (Memphis Metropolitan Airport); Miami, Fla. (Miami International Airport); Minneapolis, Minn. (Minneapolis-St. Paul International Airport); Newark, N.J. (Newark Airport); New York, N.Y. (John F. Kennedy International Airport); New York, N.Y. (La Guardia Airport); New Orleans, La. (New Orleans International Airport-Moisant Field); Oakland, Calif. (Metropolitan Oakland International Airport); Philadelphia, Pa. (Philadelphia International Airport); Pittsburgh, Pa. (Greater Pittsburgh Airport); Portland, Oreg. (Portland International Airport); San Francisco, Calif. (San Francisco International Airport); Seattle, Wash. (Seattle-Tacoma International Airport); St. Louis, Mo. (Lambert-St. Louis Municipal Airport); Tampa, Fla. (Tampa International Airport); Washington, D.C. (Washington National Airport). There is no mention of Hollywood-Burbank.

takeoffs of jets) which does not conflict with any federal law or regulation. We would agree that under existing (pre-N.E.P.A.) case law where there is in fact such a direct conflict, the local enactment is preempted. *Allegheny Airlines v. Cedarhurst*, 238 F.2d 812, 814-15 (2d Cir. 1956); *American Airlines Inc. v. Hempstead*, 398 F.2d 369, 372-375 (2d Cir. 1968), cert. den. 393 U.S. 1017 (1969); *American Airlines, Inc. v. City of Audubon Park, Kentucky*, 407 F.2d 1306, 1307 (6th Cir. 1969).⁶ But where as in this case there is no such conflict, the local enactment is valid. *Stagg v. Municipal Court*, 2 Cal. App. 3d 318 (1969).⁷

These are the four cases involving municipal limitation of aircraft-produced noise pollution. Let us examine the facts of each of them.

In the *Cedarhurst* case, the village enacted an ordinance prohibiting air flights above the city at less than 1,000 feet above the ground. *Allegheny Airlines v. Cedarhurst*, *supra*, at 814. Federal regulations required planes to pass over Cedarhurst at an elevation as low as 450 feet. *Id.* at 814-15. Hence, there was a direct conflict.

⁶One additional case deals with a proposed over-broad state statute. *Opinion of the Justices*, 271 N.E. 2d 354 (S.J.C. Mass. 1971).

⁷This corresponds with the general rule as stated by the Supreme Court in the leading case involving local regulation of a pollutant:

"In determining whether state regulation has been preempted by federal action, 'the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.'" *Huron Cement Co. v. Detroit*, *supra*, 362 U.S. 440, 443, 80 S. Ct. 813, 4 L.Ed. 2d 852 (1960).

In *Hempstead* the town adopted maximum noise levels for overflights termed "limiting noise spectra." *American Airlines, Inc. v. Hempstead, supra*, at 370. Compliance with the noise ordinances would require alteration of flight procedures and patterns established by federal regulation. *Id.*, at 375. The ordinance was therefore in direct conflict with valid applicable federal regulation. *Id.*, at 372; *see Id.*, at 370-375.

The *Audubon Park* ordinance barred operation of an aircraft over the municipality of less than 750 feet. *American Airlines, Inc. v. City of Audubon Park, Kentucky, supra*, at 1307. This was in direct conflict with federal regulations which would put an aircraft below 750 feet. *Ibid.*

In the above three cases ordinances which in fact conflicted with federal regulations were invalidated.

We have been able to find only one case where there was no conflict. In that case a municipality adopted a noise pollution ordinance substantially identical to the one enacted by Burbank. *Stagg v. Municipal Court, supra*, 2 Cal. App. 3d 318. The City of Santa Monica barred jet takeoffs between 11:00 p.m. and 7:00 a.m. of the following day. *Id.*, at 319. The California Court of Appeal found no conflict with any federal enactment. *Id.* at 321. The validity of the ordinance was upheld.

Until the district court's decision in this case, every court which considered the validity of a municipal ordinance directed at aircraft-produced noise pollution (whether by height limitation, noise limitation, or time limitation) had held those which in fact were in direct conflict with federal enactments invalid, and that which was not in direct conflict valid.

These cases have shown sensitivity to the competing demands inherent in a federal system. Not only judicial restraint but an appreciation of the roles of the various bodies of government existing within the one nation would dictate an acknowledgment of local needs in responding to local complaints about aircraft noise absent a direct conflict with federal regulation.

In this case there is no conflict between any Federal law or regulation and the Burbank ordinance. This is evident even from the findings of the District Court.

The District Court found that the airlines are "authorized" by the appropriate Federal agency to use Hollywood-Burbank Airport. [Finding 27.] Nowhere are they "directed" to use that airport, at night or in general.

The court below found that the aircraft and pilots are properly certified and that the airport is going to apply for certification. [Findings 29-33.] Nowhere are pilots, planes, or airports required to take off jets at night.

Aircraft in the vicinity of Hollywood-Burbank are subject to various Federal regulations pertaining primarily to safety. [Findings 34-53.] Nowhere are jet aircraft required to take off from Burbank at night.

There are Federal flow control regulations at various eastern airports. [Findings 53-54.] These do not exist at Hollywood-Burbank. Indeed, they do not exist at any airport which is served by flights to or from Hollywood-Burbank. [See Exs. 42-46; Rep. Tr. pp. 95-96.]

Federal regulations provide for flying at minimum altitudes under stated circumstances. [Finding 55.] They do not require taking off from Burbank at night.

The FAA chief at the Airport Traffic Control Tower in Burbank has prescribed that when certain planes take off from Burbank at night they shall use a preferential runway. [Finding 56.] (This procedure does not end noise but "merely diverts the noise to other populated areas." [Finding 56.]) Nowhere does this order require that any jet take off from Burbank at night.

The FAA has developed standard instrument departures for use at some airports (apparently not including Burbank). [Finding 57.] These do not require an airplane to take off at night.

Some of the conclusions of law strain for conflicts which are not apparent from the findings. For instance, the District Court concluded that the ordinance was in conflict with federal law in that the former's enforcement would preclude air carriers' compliance with the latter's requirement of providing adequate service. [Conclusion 17.] This is specious:

(1) An examination of the certificates of public convenience and necessity makes clear that the C.A.B. in no way required flight at night from Burbank. [Exs. 8-11; Rep. Tr. p. 68; see Ex. 35.] They are phrased in terms of *authorization*, not of *direction*.

(2) Finally as the findings state, the Burbank ordinance invalidated *no* flight in *interstate* commerce under C.A.B. jurisdiction. The only flight affected was a PSA *intrastate* one under P.U.C. jurisdiction. [Finding 61; see Finding 65.] (Should sufficient demand develop, one airline may add one flight in interstate commerce which might violate the ordinance. [Finding 66.])

The conclusions next state that the ordinance conflicts with the generalities of federal sovereignty over navigable airspace and with freedom of transit. [Finding 18.] Falling back on such generalities only serves to emphasize the lack of any federal regulation saying somebody must take off in a jet from Burbank at night with which the ordinance conflicts.

In brief, all the previous cases have drawn a wise and careful line between municipal ordinances which are in fact in direct conflict with federal law or regulation (which are invalid) and those which are not in fact in such conflict (which are valid). There is no Federal law or regulation which says that anybody has to take off in a jet airplane within the city limits of Burbank at night.

V

PREEMPTION GENERALLY.

We have previously prepared a California Attorney General's opinion on the subject of jurisdiction to regulate aircraft noise pollution. 53 Ops. Calif. Atty. Gen. 75. For the convenience of the Court we have attached a copy as Appendix C. It was prepared in less litigious circumstances and represents the opinion of this office.*

We would reiterate the attention given to two cases in the discussion by the Appellants in their Jurisdictional Statement. *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714, 83 S. Ct. 1022, 10 L.Ed. 2d 84 (1963); *Huron Port-*

*Since preparation of the opinion the National Environmental Policy Act, 42 U.S.C. §§ 4331-4347, *supra*, has been enacted, and two cases (discussed elsewhere) have been decided (other than this one). *Stagg v. Municipal Court, supra*, 2 Cal. App. 3d 318; *Opinion of the Justices, supra*, 271 N.E. 2d 354.

land Cement Co. v. Detroit, supra, 362 U.S. 440, 80 S. Ct. 813, 4 L.Ed. 2d 852 (1960).

The state of the law regarding Federal preemption of airport regulation has been well summarized by a Federal District Court as follows:

"... Unquestionably broad as are the powers of the Administrator with respect to the regulation of air traffic, it is evident in this and in other contexts that the Administrator has not so pervasively regulated the movement of aircraft that he has excluded the existence of areas of proper airport regulation." *Aircraft Owners & Pilots Ass'n. v. Port Authority of New York*, 305 F. Supp. 93, 104 (E.D.N.Y. 1969).

VI

APPELLEES' STRAW MAN

Appellees spent much time and effort in the trial and in the preparation of findings in erecting and fighting a straw man that does not figure in this case. [Findings 67-82.] Though there may be no particular burden on interstate commerce occasioned by the Burbank ordinance, appellees raised the specter of a nationwide curfew which would be prejudicial to their interests.

A. The Facts Do Not Support Appellees' Assertion

A little attention to the facts of this case is helpful. No air mail is carried to or from the Hollywood-Burbank Airport. [Finding 21.] No all-cargo flights are presently operated from Hollywood-Burbank. [Finding 22.] No flight in interstate commerce is precluded from taking off from Hollywood-Burbank by the ordinance. [Finding 61.] The only regularly scheduled flight was

an intrastate one by an airline (PSA) whose operations are solely intrastate and whose certificate of public convenience and necessity is issued by the California Public Utilities Commission. [Findings 61, 26.] (PSA also operated an intrastate charter which was allowed to continue to operate under the emergency exception to the ordinance. [Finding 62.]) One interstate airline contended that if sufficient demand developed it anticipated adding a flight which would normally conflict with the Burbank ordinance. [Finding 66.]

Appellees raised the specter of nationwide disorganization caused through six time zones by Burbank's action. [Rep. Tr. p. 13.] Again, a little fresh water on the heat of argument is helpful. From our examination of the schedules in evidence in this case, we conclude that jet flights from Hollywood-Burbank go into only one other time zone, and there are only four of these on a typical day (none during the curfew). [Exs. 42-46; Rep. Tr. p. 502.] With all due regard for the airport which is the subject of this litigation, it is not the hub of American interstate commerce. It is, in the phrase of appellee's witness, a "neighborhood airport." [Rep. Tr. p. 224.] The neighbors of the airport, in the City of Burbank, would prefer their neighbor to be a bit quieter at night.*

*One may question the neighborliness of the airlines who use the airport. Appellee's own witness from Continental Airlines testified in a manner that might lead one to conclude that the airlines generated the use rather than responded to a need:

"Our main problem is to attempt to change the travel habits of the people who are now moving between the Burbank area and Portland and Seattle. We have embarked upon a massive marketing program which includes advertising through all media, television, radio, and newspapers, and sales promotional material being mailed to the various large companies involved.

(This footnote is continued on next page)

In brief, the facts of this case show no national impact. Indeed, the facts showed no impact at all upon interstate commerce caused by Burbank's ordinance.

B. The Rights of Airport Proprietors Negate Appellees' Straw Man

Quite briefly, without regard to the existence or non-existence of Federal preemption an airport proprietor may impose a curfew. Since it may do so, the potential of a nationwide rash of curfews exists quite independently of the outcome of this case which turns upon the authority of a city.

There exists this one generally recognized exception to federal preemption—the power of the airport proprietor without violation of either the commerce or the supremacy clause to decide who is to use his airport and under what conditions. *See Griggs v. Allegheny County*, 369 U.S. 84, 82 S. Ct. 531, 7 L.Ed. 2d 585 (1962) (holding county as airport proprietor liable for damages caused by overflights); 53 Ops. Cal. Atty. Gen., *supra*, 75, 80.

The legislative history of the 1968 noise amendments to the Federal Aviation Act and the FAA have recognized the existence of this exception to federal powers. In the words of the Senate report:

“However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by air-

“We have engaged in direct sales campaigns with a number of the general traffic managers in the area in an effort to advise them of our service, convenience of the availability of the service between Burbank and Portland and Seattle.” [Rep. Tr. pp. 222-223.]

craft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory. . . . In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations." Senate Report No. 1353, July 1, 1968, U.S. Code Cong. and Admin. News (1968) 2688, 2694.

The FAA has consistently acknowledged the powers and responsibilities of airport proprietors in the field of noise. The FAA's Notice of Proposed Rule Making issued with the first proposed rules under the 1968 noise amendment states the following:

"[T]his notice does not promise a federal substitute for the actions that airport operators, as proprietors, can take and have traditionally and responsibly taken to make their airports fit the particular needs of their locales, such as establishing the conditions under which their airports and airport facilities may be used, including the issuance of specific noise ceilings." (34 Fed. Reg. 457, Jan. 11, 1969.)

In adopting the aircraft type certification noise standards the FAA notice stated:

"Relation to responsibility of airport proprietors. Compliance with Part 36 is not to be construed as a Federal determination that the aircraft

is 'acceptable,' from a noise standpoint, in particular airport environments. Responsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport. The noise limits specified in Part 36 are the technologically practicable and economically reasonable limits of aircraft noise reduction technology at the time of type certification and are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce. This limitation on the scope of Part 36 is required for consistency with the responsibilities placed upon the airport proprietor by the U.S. Supreme Court in *Griggs v. Allegheny County*, 369 U.S. 84 (1962)." 34 Federal Register 18355, November 18, 1969.

Most commercial airports in the United States, including most of those in California, are publicly owned. (*Id.* at 18356.) One major airport proprietor has adopted noise regulations in terms of perceived noise levels, the Port of New York Authority (which has proprietary authority over Kennedy, La Guardia, Newark and Teterboro Airports). Airport Rules and Regulations Rules 32010-06; Port of New York Authority, Terms and Conditions for the Operation of Jet Aircraft. Its regulations restricting runway use (despite FAA permission to use those runways) have been upheld against an airline's attack. *Port of New York Authority v. Eastern Airlines, Inc.*, 259 F. Supp. 745 (E.D. N.Y. 1966). Further regulations of the Port Authority imposing a landing fee to discourage general aviation

aircraft from landing during particular hours have also been upheld. *Aircraft Owners and Pilots Association v. Port of New York Authority*, *supra*, 305 F. Supp. 93 (E.D.N.Y. 1969).

There is therefore no bar to governmental entities which own or lease airports imposing noise restrictions in their proprietary rather than legislative capacity.¹⁰ Regarding FAA approved methods, see Hoover and Cochran, FAA, *Airport Design and Operation for Minimum Noise Exposure* (1969), 12-13; Sperry, Powers, and Oleson, FAA, *The Federal Aviation Administration Aircraft Noise Abatement Program* (1968), 21-23; 53 Ops. Cal. Atty. Gen., *supra*, 75, 82.

This being the case, appellee's straw man must slump. Whether a city may or may not impose a curfew simply does not make that much difference. Since proprietors can impose a curfew anyway, the cities' authority is not that determinative.

C. Appellees Have Chosen the Wrong Remedy

Even if we were to concede the contagion of curfews and the horrors attendant thereupon which appellees assert, they have failed to pursue their appropriate administrative remedy.

We can only reiterate the suggestion we made at the trial court. [Rep. Tr. p. 905, *et seq.*]. If Appellees' fear is a legitimate one, they should go to the FAA and determine if it can act under its rule-making powers. Perhaps there is a need for planes to take off from

¹⁰Indeed, an airport of which the Federal government is the proprietor, Washington National, appears to have a night curfew on jet operations. NASA Langley Research Center and Old Dominion University, *Transportation Noise Pollution: Control and Abatement*, p. 185 (NASA Contract NGT 47-003-028, 1970).

major cities at night. But there could hardly be a need to take off in jets from every neighborhood airport disturbing the sleep of all airport neighbors. Perhaps the FAA or the Congress would find it appropriate to require that one airport in each major city be kept open at night for such air commerce as must take place in the dark.

But surely, neither Congress nor the FAA having done this, it is a bit much to require that every neighborhood airport be subjected to nighttime noise pollution. Surely all neighborhoods are not without recourse to their local governments, particularly when those governments are acting to implement a Congressionally-declared national environmental policy.

Conclusion

1. Noise pollution is a problem. (Para. I, *supra*.)
2. Aircraft noise pollution, particularly at night, is a problem. (Para. I, *supra*.)
3. Congress has declared a National Environmental Policy against pollution. (Para. II(A), *supra*; 42 U.S.C.A. §§ 4331, 4371 (B)(1).)
4. The regulations and public laws of the nation "shall" be "interpreted" in accordance with the National Environmental Policy. (Para. II(A)(1), *supra*; 42 U.S.C. § 4332(1).)
5. "The primary responsibility for implementing this policy rests with State and local governments." (Para. II(A)(1), *supra*; 42 U.S.C.A. § 4371(b)(2).)
6. The local government in question, the City of Burbank, has implemented that policy. (Para. II (B).)

In brief, while the pre-N.E.P.A. cases of *Cedarhurst*, *Hempstead*, and *Audubon Park* dealt with local enactments in *conflict* with federal law, this case involves a local enactment in *implementation* of federal law. The ordinance is not preempted.

Respectfully submitted,

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APPENDIX A.

§ 21669. *Adoption of noise standards*

The department shall adopt noise standards governing the operation of aircraft and aircraft engines for airports operating under a valid permit issued by the department to an extent not prohibited by federal law. The standards shall be based upon the level of noise acceptable to a reasonable person residing in the vicinity of the airport.

§ 21669.1 *Establishment of noise standards advisory committee; composition*

There is hereby established an advisory committee to assist the department in the adoption of noise standards. The committee shall be composed of seven members appointed by the Governor as follows:

(a) Two members, one of whom shall be representative of homeowners concerned with aircraft noise.

(b) One member each from the Department of Public Health, the League of California Cities, the County Supervisors Association, the Department of Education, and the Air Transport Association.

The existence of the committee shall terminate on January 1, 1971.

§ 21669.2 *Guidelines*

In its deliberations the department and the advisory committee shall be governed by the following guidelines:

(a) Statewide uniformity in standards of acceptable airport noise need not be required, and the maximum amount of local control and enforcement shall be permitted.

(b) Due consideration shall be given to the economic and technological feasibility of complying with the standards promulgated by the department.

§ 21669.3 *Report to legislature; effective date of regulations; designation of airports having noise problem; establishment of monitoring system*

(a) The department shall submit a comprehensive report of the noise regulations adopted pursuant to Sections 21669, 21669.1 and 21669.2 to the Legislature on or prior to December 31, 1970, and the regulations shall go into effect on December 1, 1972, except as provided in subdivisions (b), (c), and (d).

(b) Any regulations designed to establish a noise monitoring program at an airport shall go into effect on the effective date of the amendments to this section enacted at the 1971 Regular Session of the Legislature. Any regulations applicable to airports entering service after November 30, 1971, shall go into effect on that date.

(c) Every county board of supervisors shall, as of the effective date of the amendments to this section enacted at the 1971 Regular Session of the Legislature, designate airports within their respective counties having a noise problem for purposes of this subdivision. Each airport so designated shall, on or before December 1, 1971, have a noise monitoring system meeting the requirements of the department's noise regulations in operation. The department may grant an extension of time for compliance with this subdivision where an airport operator shows to the satisfaction of the department that noise monitoring equipment is not available. This subdivision shall be effective only until December 1, 1972, and after that date shall have no force or effect.

(d) At every airport in operation on the effective date of the amendments to this section enacted at the 1971 Regular Session of the Legislature which has a volume of passenger traffic exceeding one million persons arriving and departing per year, and which is determined under subdivision (c) to have a noise problem, there shall not be any increase in the noise level beyond that which existed at such airport at the date of the determination. In the event any action taken under any noise regulation of the department, or in the event the implementation of any technological improvements, succeeds in lowering the level of noise at the airport, such reduced level of noise shall constitute the permissible limits of noise. This subdivision and the noise limits specified in this subdivision, to the extent permissible under federal law, shall be effective only until December 1, 1972, and after that date shall have no force or effect.

§ 21669.4 Violation of standards; enforcement; penalties

(a) The violation of the noise standards by any aircraft shall be deemed a misdemeanor and the operator thereof shall be punished by a fine of one thousand dollars (\$1,000) for each infraction.

(b) It shall be the function of the county wherein an airport is situated to enforce the noise regulations established by the department. To this end, the operator of an airport shall furnish to the enforcement authority designated by the county the information required by the department's regulations to permit the efficient enforcement thereof. The operator of each airport shall reimburse the county for its costs of implementing the airport noise regulations contained in

Article 8 (commencing with Section 5050) of subchapter 6 of Title 4 of the California Administrative Code, which shall, for purposes of subdivision (c), credit the operator for any amounts received from penalties assessed for violations at such airport. Upon request of the operator, the department shall review and shall determine the reasonableness of such costs, and such costs may be considered in fixing any airport user fees.

(c) Penalties assessed for the violation of the noise regulations shall be used first to reimburse the General Fund for the amount of any money appropriated to carry out the purposes for which the noise regulations are established, and second be used in the enforcement of the noise regulations at participating airports.

§ 21669.5 *Construction of regulations; duty of care; presumptions; evidence*

(a) The noise regulations adopted pursuant to Sections 21669, 21669.1, and 21669.2 shall not be construed to establish a duty of care in favor of any person or entity and shall not create for use by any person or entity a presumption to establish in any eminent domain proceeding a taking or damaging of property or a presumption to establish injury, damage, or a taking in any action or proceeding to recover for injury, damaging, or taking by reason of the operation of aircraft or aircraft engines. Such regulations shall be inadmissible as evidence, and shall not be a proper basis for an opinion or a proper basis for cross-examining or impeaching a witness, or a matter of which judicial notice may be taken, in any eminent domain action or

in any action or proceeding to recover for injury, damaging, or taking by reason of the operation of aircraft or aircraft engines.

(b) Subdivision (a) shall not apply in any action or proceeding brought under this part to enforce the noise regulations or to punish violations thereof.

(c) This section shall remain in effect until the 61st day after final adjournment of the 1974 Regular Session of the Legislature, and shall have no force or effect after that date.

APPENDIX B.

TITLE 4 DEPARTMENT OF AERONAUTICS

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(Register 70, No. 48—11-28-70)

SUBCHAPTER 6. NOISE STANDARDS

Article 1. General

5000. Preamble. The following rules and regulations are promulgated in accordance with Article 3, Chapter 4, Part 1, Division 9, Public Utilities Code (Regulation of Airports) to provide noise standards governing the operation of aircraft and aircraft engines for all airports operating under a valid permit issued by the department. These standards are based upon two separate legal grounds: (1) the power of airport proprietors to impose noise ceilings and other limitations on the use of the airport, and (2) the power of the state to act to an extent not prohibited by federal law. The regulations are designed to cause the airport proprietor, aircraft operator, local governments, pilots, and the department to work cooperatively to diminish noise. The regulations accomplish these ends by controlling and reducing the noise in communities in the vicinity of airports.

NOTE: Authority cited: Section 21669, Public Utilities Code. Reference: Sections 21669-21669.4, Public Utilities Code.

History: 1. New Subchapter 6 (§§ 5000-5006, 5010-5014, 5020-5025, 5030-5032, 5035, 5040, 5045-5048, 5050, 5055, 5060-5064, 5065, 5070, 5075, 5080, 5080.1-5080.5) filed 10-25-70; designated effective 12-1-71 (Register 70, No. 48).

5001. Liberal Construction. This subchapter shall be liberally construed and applied to promote its underlying purposes which are to protect the public from noise and to resolve incompatibilities between airports and their surrounding neighbors.

5002. Constitutionality. If any provision of this subchapter or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the subchapter and the application of such provision to other persons or circumstances shall not be affected thereby.

5003. Provisions Not Exclusive. The provisions of this subchapter are not exclusive, and the remedies provided for in this subchapter shall be in addition to any other remedies provided for in any other law or available under common law. It is not the intent of these regulations to preempt the field of aircraft noise limitation in the state. The noise limits specified herein are not intended to prevent any local government to the extent not prohibited by federal law or any airport proprietor from setting more stringent standards.

5004. Applicability. These regulations establish a mandatory procedure which is applicable to and at all existing and future potential airports in California which are required to operate under a valid permit issued by the department. These regulations are applicable (to the degree not prohibited by federal law) to all operations of aircraft and aircraft engines which produce noise. Only those airports which shall have been determined to have a noise problem (in accordance with Section 5050) will be required to perform noise monitoring.

The regulations established by this subchapter are not intended to set noise levels applicable in litigation

arising out of claims for damages occasioned by noise. Nothing herein contained in these regulations shall be construed to prescribe a duty of care in favor of, or to create any evidentiary presumption for use by, any person or entity other than the State of California, the counties and airport proprietors in the enforcement of these regulations.

5005. Findings. Citizens residing in the vicinity of airports are exposed to the noise of aircraft operations. There have been numerous instances wherein individual citizens or organized citizen groups have complained about airport noise to various authorities. The severity of these complaints has ranged from a few telephone calls to organized legal action. Many of these cases have been studied by acoustics research workers under sponsorship of governmental and private organizations. These studies have generally shown that the severity of the complaint is principally associated with a combination of the following factors:

- (a) Magnitude and duration of the noise from aircraft operations;
- (b) Number of aircraft operations; and
- (c) Time of occurrence during the day (daytime, evening or night).

There are many reasons given by residents for their complaints; however, those most often cited are interference with speech communication, TV, and sleep. A number of studies have been made related to speech interference and hearing damage, and some studies have been made related to sleep disturbance and other physiological effects. These studies provide substantial evidence for the relationship between noise level and its interference with speech communication and its

effect relative to hearing loss. Significantly less information is available from the results of sleep and physiological studies.

In order to provide a systematic method for evaluating and eventually reducing noise incompatibilities in the vicinity of airports, it is necessary to quantify the noise problem. For this purpose, these regulations establish a procedure for defining a noise impact area surrounding an individual airport. The criteria and noise levels utilized to define the boundaries of the noise impact area have been based on existing evidence from studies of community noise reaction, noise interference with speech and sleep, and noise induced hearing loss.

One of the fundamental philosophies underlying the procedures in these regulations is that any noise quantity specified by these regulations be measurable by relatively simple means. Therefore, these regulations utilize as their basic measure the A-weighted noise level, which is the most commonly accepted simple measure. To insure consistency between criteria and measurement, the units for the criteria are also based on the A-weighted sound level rather than one of the several more complex perceived noise levels.

These regulations provide a procedure to limit the allowable noise for an individual aircraft flyby measured at specified points in the vicinity of the airport. The noise limits are specified in terms of the class of aircraft and measurement location.

The level of noise acceptable to a reasonable person residing in the vicinity of an airport is established as a community noise equivalent level (CNEL) value of 65 dB for purposes of these regulations. This criterion

level has been chosen for reasonable persons residing in urban residential areas where houses are of typical California construction and may have windows partially open. It has been selected with reference to speech, sleep and community reaction.

It is recognized that there is a considerable individual variability in the reaction to noise. Further, there are several factors which undoubtedly influence this variability and which are not thoroughly understood. Therefore, this criterion level does not have a degree of precision which is often associated with engineering criteria for a physical phenomenon (e.g., the strength of a bridge, building, et cetera). For this reason, the state will review the criterion periodically, taking into account any new information which may become available.

5006. Definitions (a) Sound Pressure Level (SPL): The sound pressure level, in decibels (dB), of a sound is 20 times the logarithm to the base of 10 of the ratio of the pressure of this sound to the reference pressure. For the purpose of these regulations, the reference pressure shall be 20 micronewtons/square meter (2×10^{-4} microbar).

(b) Noise Level (NL): Noise level, in decibels, is an A-weighted sound pressure level as measured using the slow dynamic characteristic for sound level meters specified in ASA S1.4—1961. American Standard Specification for General Purpose Sound Level Meters, or latest revision thereof. The A-weighting characteristic modifies the frequency response of the measuring instrument to account approximately for the frequency characteristics of the human ear. The reference pressure is 20 micronewtons/square meter (2×10^{-4} microbar).

(c) *Noise Exposure Level (NEL)*: The noise exposure level is the level of noise accumulated during a given event, with reference to a duration of one second. More specifically, noise exposure level, in decibels, is the level of the time-integrated A-weighted squared sound pressure for a stated time interval or event, based on the reference pressure of 20 micronewtons per square meter and reference duration of one second.

(d) *Single Event Noise Exposure Level (SENEL)*: The single event noise exposure level, in decibels, is the noise exposure level of a single event, such as an aircraft flyby, measured over the time interval between the initial and final times for which the noise level of a single event exceeds the threshold noise level. For implementation in this subchapter of these regulations, the threshold noise level shall be at least 30 decibels below the numerical value of the single event noise exposure level limits specified in Section 5035.

(e) *Hourly Noise Level (HNL)*: The hourly noise level, in decibels, is the average (on an energy basis) noise level during a particular hour. Hourly noise level is determined by subtracting 35.6 decibels equal to $10 \log_{10} 3600$ from the noise exposure level measured during the particular hour, integrating for those periods during which the noise level exceeds a threshold noise level.

For implementation in this subchapter of these regulations, the threshold noise level shall be a noise level which is 10 decibels below the numerical value of the appropriate criterion CNEL which is specified in Section 5012. At some microphone locations, sources of noise other than aircraft may contribute to the CNEL. Where the airport proprietor can demonstrate that the

accuracy of the CNEL measurement will remain within the required tolerance in Section 5045, the department may grant a waiver to increase the threshold noise level.

(f) *Daily Community Noise Equivalent Level (CNEL)*: Community noise equivalent level, in decibels, represents the average day-time noise level during a 24-hour day, adjusted to an equivalent level to account for the lower tolerance of people to noise during evening and night time periods relative to the day-time period. Community noise equivalent level is calculated from the hourly noise levels by the following:

$$\text{CNEL} = 10 \log \frac{1}{24} \left[\sum \text{antilog} \frac{\text{HNLD}}{10} + 3 \sum \text{antilog} \frac{\text{HNLE}}{10} + 10 \sum \text{antilog} \frac{\text{HNLN}}{10} \right]$$

Where

HNLD are the hourly noise levels for the period 0700-1900 hours;

HNLE are the hourly noise levels for the period 1900-2200 hours;

HNLN are the hourly noise levels for the period 2200-0700 hours; and Σ means summation.

(g) *Annual CNEL*: The annual CNEL, in decibels, is the average (on an energy basis) of the daily CNEL over a 12-month period. The annual CNEL is calculated in accordance with the following:

$$\text{Annual CNEL} = 10 \log_{10} \left[\frac{1}{365} \sum \text{antilog} \left(\frac{\text{CNEL}(i)}{10} \right) \right]$$

Where

CNEL(i)—the daily CNEL for each day in a continuous 12-month period, and Σ means summation.

When the annual CNEL is approximated by measurements on a statistical basis, as specified in Section 5022, the number 365 is replaced by the number of days for which measurements are obtained.

(h) *Noise Impact Boundary*: Noise impact boundary around an airport consists of the locus of points for which the annual CNEL is equal to the criterion value.

(i) *Noise Impact Area*: Noise impact area, in square statute miles, is the total land area within the noise impact boundary less that area deemed to have a compatible land use in accordance with Section 5014.

(j) *Airport Proprietor*: Airport proprietor means the holder of an airport permit issued by the department pursuant to Article 3, Chapter 4, Part 1, Division 9, Public Utilities Code.

(k) *Aircraft Operator*: Aircraft operator means the legal or beneficial owner of the aircraft with authority to control the aircraft utilization; except where the aircraft is leased, the lessee is the operator.

(l) *Air Carrier*: Air carrier is any aircraft operating pursuant to either a federal or a state certificate of public convenience and necessity, including any certificate issued pursuant to 49 U.S.C. Section 1371 and any permit issued pursuant to 49 U.S.C. Section 1372.

(m) *General Aviation*: General aviation aircraft are all aircraft other than air carrier aircraft and military aircraft.

(n) *Department*: Department means the Department of Aeronautics of the State of California.

(o) *County*: County, as used herein, shall mean the county board of supervisors or its designee authorized to exercise the powers and duties herein specified.

Article 2. Airport Noise Limits

5010. Purpose. The purpose of these regulations is to provide a positive basis to accomplish resolution of existing noise problems in communities surrounding airports and to prevent the development of new noise problems. To accomplish this purpose, these regulations establish a quantitative framework within which the various interested parties (i.e., airport proprietors, aircraft operators, local communities, counties and the state) can work together effectively to reduce and prevent airport noise problems.

5011. Methodology for Controlling and Reducing Noise Problems. The methods whereby the impact of airport noise shall be controlled and reduced include but are not limited to the following:

(a) Encouraging use of the airport by aircraft classes with lower noise level characteristics and discouraging use by higher noise level aircraft classes;

(b) Encouraging approach and departure flight paths and procedures to minimize the noise in residential areas;

(c) Planning runway utilization schedules to take into account adjacent residential areas, noise characteristics of aircraft and noise sensitive time periods;

(d) Reduction of the flight frequency, particularly in the most noise sensitive time periods and by the noisier aircraft;

(e) Employing shielding for advantage, using natural terrain, buildings, et cetera; and

(f) Development of a compatible land use within the noise impact boundary.

Preference shall be given to actions which reduce the impact of airport noise on existing communities. Land use conversion involving existing residential communities shall normally be considered the least desirable action for achieving compliance with these regulations.

5012. Airport Noise Criteria. Limitations on airport noise in residential communities are hereby established.

(a) The criterion community noise equivalent level (CNEL) is 65 dB for proposed new airports and for vacated military airports being converted to civilian use.

(b) Giving due consideration to economic and technological feasibility, the criterion community noise equivalent level (CNEL) for existing civilian airports, (except as follows) is 70 dB until December 31, 1985, and 65 dB thereafter.

(c) The criterion CNEL for airports which have 4-engine turbojet or turbofan air carrier aircraft operations and at least 25,000 annual air carrier operations (takeoffs plus landings) is as follows:

<i>Date</i>	<i>CNEL in decibels</i>
Effective date of regulations to 12-31-75 ..	80
1-1-76 to 12-31-80	75
1-1-81 to 12-31-85	70
1-1-86 and thereafter	65

5013. Noise Impact Boundary. The noise impact boundary at airports which have a noise problem as determined in accordance with Section 5050 shall be established and validated by measurement in accordance with the procedures given in Article 3 of this subchapter. For proposed new airports, or for anticipated changes of existing airports, the noise impact boundary

shall be estimated by applicable acoustical calculation techniques.

The area of land which is within the noise impact boundary and which has incompatible land use is utilized as a measure of the magnitude of the noise problem at an airport. The concepts of noise impact boundary and noise impact area are illustrated in Figure 1.

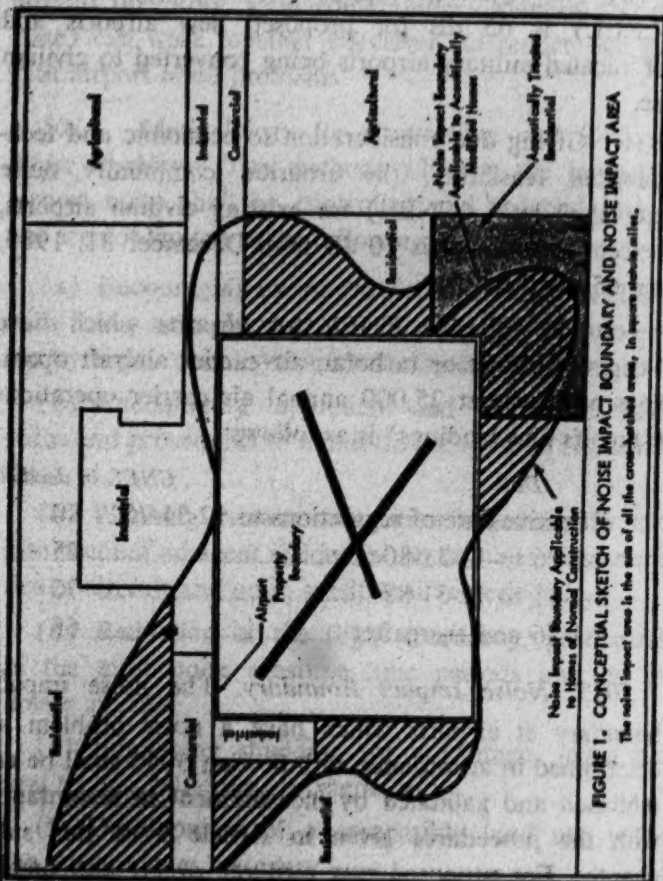


FIGURE 1. CONCEPTUAL SKETCH OF NOISE IMPACT BOUNDARY AND NOISE IMPACT AREA

The noise impact area is the sum of all the cross-hatched areas, in square statute miles.

5014. Compatible Land Uses Within the Noise Impact Boundary. The criterion for the noise impact boundary was established for residential uses including single-family and multiple-family dwellings, trailer parks, and schools of standard construction. Certain other land uses may occur within the boundary but be compatible with the community noise equivalent level and hence be excluded in the calculation of noise impact area. For this purpose, the following land uses are deemed compatible:

- (a) Agricultural;
- (b) Airport property;
- (c) Industrial property;
- (d) Commercial property;
- (e) Property subject to an aviation easement for noise;
- (f) Zoned open space;
- (g) High-rise apartments in which adequate protection against exterior noise has been included in the design and construction, together with a central air conditioning system. Adequate protection means the noise reduction (exterior to interior) shall be sufficient to assure that interior community noise equivalent level in all habitable rooms does not exceed 45 dB during aircraft operations. Acoustical performance of the buildings shall be verified by calculation or measured by qualified officials of the building inspection agency of the city or county in which the buildings are situated;
- (h) In the case of existing airports and existing homes only, residential areas in which existing homes have been acoustically treated need not be subject to exterior noise limits quite as strict as those for normal residential construction. For this purpose, the com-

munity noise equivalent level on the boundary of such a residential area may be increased by as much as 15 dB over the community noise equivalent level criterion for nonacoustically treated homes. The amount of the increase allowed on the boundary is the difference between the noise level reduction of the treated home and the value 20 decibels which is assumed to be the noise level reduction of an average normal residence. The noise level reduction of a home is defined as the average difference between aircraft noise levels in free space outside of the home and the corresponding noise levels in rooms on the exposed sides of the home.

In carrying out this section, the actual use to which the land is put, not the classification for which the land is zoned, is determinative.

Article 3. Establishing and Validating Noise Impact Boundaries for Airports Required to Monitor

5020. Validation of the Noise Impact Boundary. For airports with a noise problem (in accordance with Section 5050), the noise impact boundary shall be validated by measurements made at locations specified in Section 5021 and according to frequency requirements specified in Section 5022. These measurements shall be utilized to calculate the daily community noise equivalent levels. These daily CNEL values will then be averaged (on an energy basis) to obtain the annual CNEL at each of the community measurement locations. The location of the noise impact boundary will be considered valid if the value of the annual CNEL lies within ± 1.5 dB of the criterion value.

5021. Community Measurement Locations. At least twelve (12) locations, approximately equidistant, but

not exceeding one and one-half (1.5) statute miles separation, shall be selected along the noise impact boundary. The locations shall be selected such that the maximum extent of the boundary be determined with reference to the airport's flight patterns.

5022. Frequency of Measurement at Community Locations. (a) For airports with 1,000 or more homes within the noise impact boundary based on a CNEL of 70 dB, continuous monitoring is required at those monitoring positions which fall within residential areas. Measurement for at least 48 weeks in a year shall be considered as continuous monitoring.

(b) For all other locations and for all locations at other airports, an intermittent monitoring schedule is allowed. The intermittent monitoring schedule shall be designed so as to obtain the resulting annual CNEL as computed from measurements at each location which will correspond to the value which would be measured by a monitor operated continuously throughout the year at that location, within an accuracy of ± 1.5 dB.

Thus, it is required that the intermittent monitoring schedule be designed so as to obtain a realistic statistical sample of the noise at each location. As a minimum, this requires that measurements be taken continuously for 24-hour periods during four 5-day samples throughout the year, chosen such that for each sample, each day of the week is represented, the four seasons of the year are represented, and the results account for the effect of annual proportion of runway utilization. At most airports, these intermittent measurements can be accomplished by a single portable monitoring instrument.

5023. Initial Establishment of the Noise Impact Boundary. The method to be used for initial estab-

lishment of the noise impact boundary of airports required to monitor will vary depending upon specific situations. The following guidelines represent one possible method:

(a) Calculate the approximate location of the noise impact boundary using applicable acoustic estimation techniques.

(b) Select convenient measurement locations on this estimated boundary according to Section 5021.

(c) Make a suitable series of CNEL trial measurements along lines perpendicular to the estimated noise impact boundary. For example, two to three measurements over a one-to-seven day period along a line perpendicular to the estimated noise impact boundary should provide sufficient data to define, within the required accuracy, the nominal position of the noise impact boundary.

Due consideration should be given to the number and time period of aircraft operations, mix of aircraft classes, average runway utilization and other measurable factors which would cause a difference between the trial measurements of CNEL and the expected annual average.

(d) Initiate validation measurements of the noise impact boundary following selection of permanent or intermittent monitoring locations to comply with the validation accuracy criterion specified in Section 5020. For permanent measurement locations at which the measured CNEL lies outside this accuracy criterion, suitable auxiliary measurements or analytical methods may be used to extrapolate the measured CNEL to determine the value on the noise impact boundary. Such extrapolation procedures are subject to approval by the department.

5024. *Deviations from Specified Measurement Locations.* Recognizing the unique geographic and land use features surrounding specific airports, the department will consider measurement plans tailored to fit any airport for which the specified CNEL monitoring locations are impractical. For example, monitors should not be located on bodies of water or at points where other noise sources might interfere with aircraft CNEL measurements, nor are measurements required in regions where land use will clearly remain compatible.

5025. *Alternative Measurement Systems.* The acquisition of measurement systems that are more extensive or scientifically more refined than those specified herein is encouraged, particularly at airports with a major noise problem, where compliance with the intent of Section 5075(a)(4) requires more comprehensive noise monitoring, particularly to monitor noise abatement procedures. Airports contemplating the acquisition of such monitoring systems may apply to the department for exemptions from specific monitoring requirements set forth in this subchapter of these regulations.

Article 4. Measurement of Single Event Noise Exposure Level

5030. *Measurement Requirements.* Measurements of the single event noise exposure level (SENEL) shall be made in the vicinity of airports with a noise problem as determined in accordance with Section 5050. These measurements are intended to monitor the noise of aircraft to insure compliance with the noise limits recommended by the airport proprietor and approved by the department in accordance with Article 5.

5031. Measurement Locations. Measurements shall be made on the centerline of the nominal takeoff and landing flight tracks for air carrier jet aircraft and private jet aircraft at the locations specified in Figure 2. The nominal flight track is the line projected on the ground under the nominal flight path of the aircraft. Measurements will not be required for landing or take-off flight tracks associated with aircraft operations

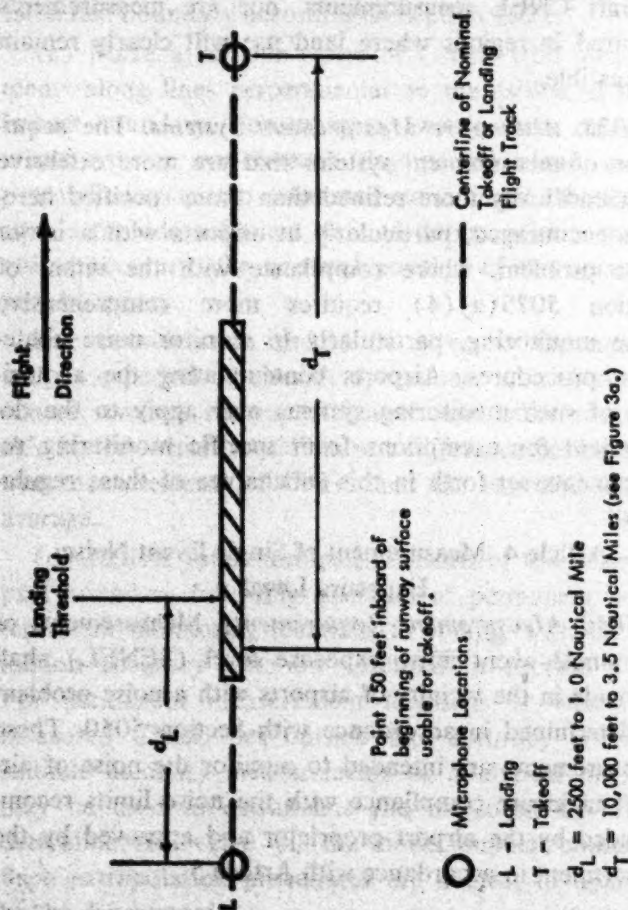


FIGURE 2. SINGLE EVENT NOISE EXPOSURE LEVEL MONITORING POSITIONS

which do not contribute to the noise impact area of the airport.

5032. Frequency of Measurement. At each microphone location, single event noise exposure level measurements shall be made continuously for a minimum of 48 weeks per year. The remaining 4 weeks are intended to allow for intermittent periods of down-time for equipment maintenance and calibration.

Article 5. Single Event Noise Limits

5035. Maximum Single Event Noise Exposure Levels. The proprietor of each airport which is required to perform noise monitoring shall recommend to the department the single event noise exposure level limits appropriate to his airport. In no event shall the limits recommended by the airport proprietor exceed the values in Figures 3A and 3B which correspond to the noisiest aircraft class utilizing the airport on a recurrent basis (which shall mean an average of at least two aircraft operations per day) during the six-month period prior to the determination that the airport has a noise problem (Section 5050). The values in Figures 3A and 3B (see pp. 24-25) are based on maximum gross weight operation without noise abatement flight procedures under standard atmospheric conditions at sea level. Airport proprietors are therefore encouraged to recommend lower limits. Upon approval of such limits at a specific airport, those limits will be enforced by the county in accordance with this entire subchapter of these regulations.

Article 6. Additional Monitoring Locations

5040. Additional Monitoring Locations. For airports which are required to monitor, additional monitoring locations may be useful in some cases. These additional

Curve	Altitude Class
A	4 Engine Turbojet Turboprop (e.g., 707, 720, DC-8)
B	4 Engine "Jumbo" Turboprop (e.g., 747)
C	3 Engine Turboprop and Airliner (e.g., 720, DC-10, L-1011)
D	2 Engine Turboprop (e.g., DC-9, 737)
E	2 Engine Business Jet
E+3 dB	4 Engine Business Jet
	* High Bypass Ratio Engine

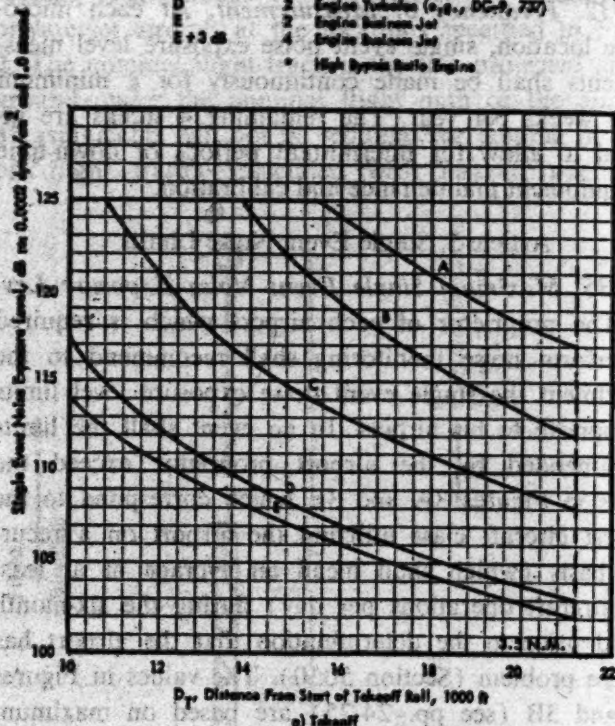


FIGURE 3A. MAXIMUM LIMITS FOR SINGLE EVENT NOISE EXPOSURE LEVEL

locations may be utilized for measurement of either single event noise exposure levels (such as monitoring of noise abatement flight procedures) or community noise equivalent levels (such as at fixed points in high noise level residential areas). The frequency of measurement at these additional monitoring locations should be determined on the basis of each specific situation.

Cat	Aircraft Class
Z	4 Engine Turbojet and Turbofan (e.g., 707, 720, DC-8)
Y	2,3 Engine Turbofan (e.g., 727, 737, DC-9)
X	4 Engine "Jumbo" Turbofan* (e.g., 747)
W	3 Engine Airbus Turbofan* (e.g., DC-10, L-1011)
V	2 Engine Business Jet
V+3 dB	4 Engine Business Jet

* High Bypass Ratio Engine

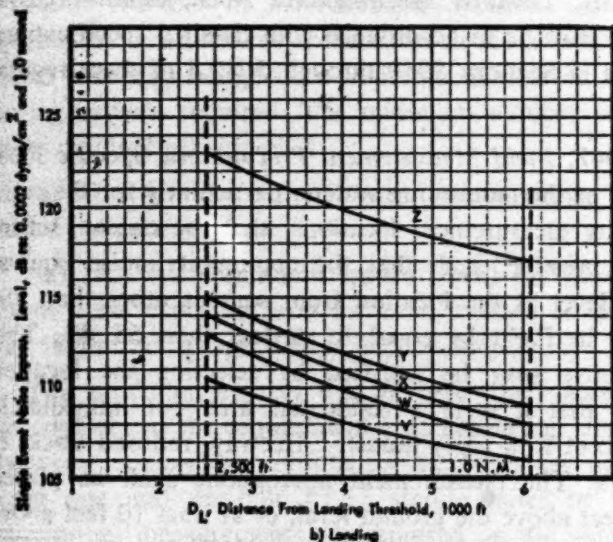


FIGURE 3B. MAXIMUM LIMITS FOR SINGLE EVENT NOISE EXPOSURE LEVEL

Article 7. Noise Monitoring System Requirements

5045. General Specifications. (a) The noise monitoring system shall provide for the following outputs:

(1) In the vicinity of airport (see Article 5). Single event noise exposure levels exceeding the maximum limits, together with their time of occurrence.

(2) In community (see Section 5020). Hourly noise level for each hour of the day, together with identification of the hour.

(b) The overall accuracy of the noise measurement system shall be ± 1.5 dB, determined in accordance with the procedure of the noise measurement system specification given in Sections 5080 through 5080.5 of these regulations.

5046. Detailed Specifications. Noise monitoring systems shall be in accordance with detailed specifications given in Sections 5080 through 5080.5 of these regulations.

5047. Field Measurement Precautions. Specific locations of the monitoring system, particularly for the community measurement locations, shall be chosen, whenever possible, such that the community noise equivalent level at the location from sources other than aircraft in flight be equal to or less than 55 dB. This objective may be satisfied by selecting the location such that it is in a residential area not immediately adjacent to a noisy industry, freeway, railroad track, et cetera. The measurement microphone shall be placed 20 feet above the ground level, or at least 10 feet above neighboring roof tops, whichever is higher. To the extent practicable, the following precautions shall be followed:

(a) Each SENEL monitor location shall be in an open area surrounded by relatively flat terrain, having no excessive sound absorption characteristics such as might be caused by thick, tall grass, shrubbery, or wooded areas.

(b) No obstructions which significantly influence the sound field from the aircraft shall exist within a conical space above the measurement position, the cone being defined by an axis along a line of sight normal to the aircraft path and by a half angle of 75 degrees from this axis.

(c) When the foregoing precautions are not practicable, the microphones shall be placed at least 10 feet above neighboring buildings in a position which has a clear line-of-sight view to the path of the aircraft in flight.

5048. Number of Measurement Systems. The frequency of measurement specified in Sections 5022 and 5032 has been designed to limit the number of monitoring systems required. The minimum number of systems required per airport is:

(a) One for intermittent measurements of the noise impact boundary, plus

(b) One for continuous measurement of the single event noise exposure level for each landing or departure flight track as specified in Section 5031.

This minimum number will increase where necessary to conform to the requirement that separation distance between monitoring positions on the boundary not exceed one and one-half (1.5) statute miles or when continuous measurements are required on the measurement boundary in accordance with Section 5022.

Article 8. Implementation by Counties

5050. Counties. (a) The county wherein an airport is situated shall enforce this subchapter of these regulations.

(b) In recognition of the requirement to allow the maximum amount of local control and enforcement of this regulation, the county shall determine which of the airports within its boundaries are required to initiate aircraft noise monitoring in accordance with these regulations. The county shall require noise monitoring by the airports within its boundaries that are deemed

to have a noise problem as determined by the county. For airports with joint use by both military and civilian aircraft operations, the determination of the existence of a noise problem shall be based upon the civilian operations. In making a determination that a noise problem exists around an airport, the county shall:

(1) Investigate the possible existence of a noise impact area greater than zero based on a CNEL of 70 dB, and determine whether or not people actually reside inside the noise impact boundary;

(2) Review other information that it may deem relevant, including but not limited to complaint history and legal actions brought about by aircraft noise; and

(3) Coordinate with, and give due consideration to the recommendations of, the county airport land use commission (as defined in Public Utilities Code Section 21670).

(c) Any affected or interested person or any government agency disagreeing with the county's findings regarding the existence of a noise problem at a given airport may file an appeal with the department. Upon receipt of such an appeal, the department shall make an investigation and determination as to the validity of the county's findings. The department shall serve by mail the written record of such investigation and determination to the county, the airport proprietor, and the affected or interested person or governmental agency. If the department finds that the county's determination does not correspond to the facts, the county shall adhere to the determination of the department. Whenever the department has served such record, the county, airport proprietor, affected or interested person,

or government agency may in writing within 10 days demand a hearing. In such case, the department shall file a statement of issues and shall conduct proceedings in accordance with the Administrative Procedure Act (Chapter 5, Part 1, Division 3, Title 2, Government Code).

(d) For all airports required to perform noise monitoring, the counties shall validate monitoring data supplied by the airport proprietor and shall enforce these regulations in all respects.

(e) The county shall submit quarterly reports to the Department of Aeronautics. Each report is due 45 days after the end of the quarter of the calendar year covered in the report. The report shall contain at least the following information on each airport within the county covered by these regulations:

(1) A map illustrating the location of the noise impact boundary, as validated by measurement, and the location of measurement points, in the four preceding quarters;

(2) The annual noise impact area as obtained from the preceding four calendar quarters, and as obtained in accordance with Article 2 of this subchapter of these regulations;

(3) The daily CNEL measurements, together with identification of the dates on which each measurement was made, number of total aircraft operations during the quarter, estimated number of operations of the highest noise level aircraft class in the quarter, and any other data which is pertinent to the activity during the quarter. In addition, the HNL data shall be retained for at least 3 years, and made available to the department upon request; and

(4) The total number of recorded violations of the single event noise exposure level limits, subtotals of such violations categorized by aircraft class, a list of the names of the aircraft operations in question, the number of violations by each, the single event noise exposure level corresponding to each violation, and the disposition made or fine collected for each violation.

(f) The counties shall establish the requirements for identification of aircraft operators whose aircraft exceed the single event noise exposure levels in Article 5 of Subchapter 6 of these regulations.

(g) The department will maintain in file, for a period of at least 3 years, all the noise data received pursuant to these regulations. These records shall be maintained in accordance with the provisions of the California Public Records Act (Chapter 3.5, Division 1, Title 1, Government Code).

Article 9. Implementation by Aircraft Operators

5055. Aircraft Operators. No operator of an aircraft shall operate any aircraft in excess of the single event noise exposure level limits adopted in accordance with Article 5 of this subchapter of these regulations. No violation exists if the operator establishes that such operation is the direct result of the pilot's exercise of his responsibility for safety of the passengers, crew, cargo and aircraft or of his emergency authority. Violation of such limits is punishable as prescribed in Public Utilities Code Section 21669.4.

Article 10. Implementation by Airport Proprietors

5060. Monitoring Requirements. (a) All airport proprietors shall cooperate with the county in the county's investigations to determine the existence of a noise problem, and shall furnish such data as the county may require.

(b) Each airport proprietor whose airport is determined to have a noise problem shall measure, establish and validate noise impact boundaries, monitor as required in Articles 3, 4 and 7 of this subchapter of these regulations, and shall furnish such data as the county may require.

5061. Single Event Noise Limit Violations. No airport proprietor shall knowingly permit any aircraft operator to exceed the single event noise exposure level limits established in accordance with Article 5 of this subchapter of these regulations.

5062. Noise Impact Area Violations. No airport proprietor shall operate his airport with a noise impact area of other than zero unless said operator has a variance as prescribed in Article 13 of this subchapter of these regulations.

5063. Submittal of Monitoring Plan. Each airport proprietor who is required to perform noise monitoring shall submit a description of his monitoring plan to the county and to the department for approval. Such descriptions shall contain at least the following information:

(a) The general monitoring system plan, including at least locations and instrumentation;

(b) Justification for any proposed deviations from the measurement system locations specified in these regulations;

(c) Statistical sampling plan proposed for intermittent monitoring at community locations;

(d) The proprietor's recommended single event noise limits for his airport; and

(e) Additional information as pertinent or as requested by the department.

5064. *Grounds for Approval.* Failure of the airport proprietor to comply with the provisions of Subchapter 6 of these regulations constitutes a ground for denial of approval of an airport site within the meaning of Public Utilities Code, Section 21666.

Article 11. Implementation by the Department

5065. *Implementation by the Department.* The department will review the data submitted quarterly by the counties for the purpose of assessing the degree of compliance with this subchapter of these regulations. The department's review will include, but not be limited to, observation of any changes in boundary monitor positions and any changes in numerical values of CNEL.

Article 12. Schedule of Implementation

5070. *Schedule of Implementation.* (a) For airports in existence on the effective date of this subchapter of these regulations, counties shall complete their determination of whether or not a noise problem exists within the shortest feasible time after the effective date of these regulations. In no event shall the time for completion of this determination exceed 6 months from the effective date of these regulations.

(b) Each proprietor of an airport that has a noise problem, upon receipt of notification from the county, shall initiate noise monitoring within the shortest feasible

ible time not to exceed 6 months in accordance with this subchapter of these regulations and concurrently shall make application to the department for a temporary variance in accordance with Article 13.

Article 13. Variances

5075. *Variances.* (a) In granting variances, the department shall be guided by the underlying intent of these regulations as follows:

(1) That the noise impact area surrounding proposed new airports be zero;

(2) That the proprietor of each existing airport having a surrounding noise impact area of zero based on a CNEL of 70 dB take actions to prevent a noise impact area of greater than zero;

(3) That the proprietor of each existing airport having a surrounding noise impact area of greater than zero based on a CNEL of 70 dB take actions to prevent an increase of the airport's noise impact area; and

(4) That the proprietor of each existing airport having a surrounding noise impact area of greater than zero based on a CNEL of 70 dB be required to develop and implement programs to reduce the noise impact area of the airport to an acceptable degree in an orderly manner over a reasonable period of time.

(b) An airport proprietor may request variances from the requirements of any or all of these regulations, except for Sections 5012 and 5013, for periods of not exceeding one year as set forth hereinafter:

(1) The airport proprietor shall apply to the department for a variance.

(2) Such application for variance shall be made upon a form which the department shall make available.

(3) Such application shall set forth the reasons why the airport proprietor believes said variance is necessary. The application shall state the future date by which the airport proprietor expects to achieve compliance with the regulations from which a variance is sought. The application shall set forth an incremental schedule of noise impact area reductions for the intervening time.

(4) The department may grant a variance if the public interest would be satisfied by such a variance. In weighing the public interest, the department's considerations include but are not limited to the following:

(A) The economic and technological feasibility of complying with the noise standards set by these regulations;

(B) The noise impact should the variance be granted;

(C) The value to the public of the services for which the variance is sought; and

(D) Whether the airport proprietor is taking *bona fide* measures to the best of his ability to achieve the noise standards set by these regulations.

(5) The burden of proof shall be upon the applicant for a variance.

(6) On its own motion, or upon the request of an affected or interested person, the department shall hold a public hearing in connection with the approval of an application for a variance. Any

interested person may obtain from the department information on pending requests for variances at any time.

(7) The department in granting a variance may impose reasonable conditions which it deems necessary to effectuate the purposes of this subchapter of these regulations.

Article 14. Specification: Noise Monitoring System

5080. Purpose and Scope. (a) *Purpose.* This specification establishes the minimum requirements for instrumentation to be utilized by agencies required to monitor aircraft noise in accordance with Articles 1 through 13 of this subchapter of these regulations.

(b) *Scope.* Two measurement systems are defined herein. One system shall be utilized to monitor the noise at specifically-designated locations adjacent to airport runways. The second system shall be utilized to monitor noise levels at specifically-designated locations in the community surrounding the airport.

(c) *Design Goals.* The design goals for the monitor system are accuracy, reliability, and ease of maintenance. The measurement techniques set forth are sufficiently uncomplicated so that current state-of-the-art instrumentation equipment may be utilized to configure the two systems. Analysis and recording techniques vary; however, this specification delineates a procedure whereby maximum commonality of systems elements may be achieved.

The monitor system specifications are not intended to be unduly restrictive in specifying individual system components. The specifications allow the utilization of equipment ranging from analog systems to automated

computer systems. The exact configuration will depend upon the specific monitoring requirement and the nature of existing user instrumentation.

This is a total systems specification. It is the prerogative of the user to configure the system with components which will be most compatible with his existing equipment and personnel.

5080.1. Additional Definitions Applicable to Article 14. (a) *Field Instrumentation.* Refers to those elements of a noise monitoring system that are exposed to the outdoor environment in the vicinity of the measurement microphone. This equipment must function within specification during exposure to a year-around environment adjacent to any airport licensed by the state of California.

(b) *Centralized Instrumentation.* Refers to those elements of the noise monitoring system which will be contained in an environmentally-controlled room.

(c) *SENEL Monitoring System.* The SENEL monitoring system shall measure single event noise exposure levels exceeding the maximum allowable single event noise exposure level and shall log the time of occurrence of each such event. An SENEL system consists of two subsystems: a noise level subsystem and an integrator/logger subsystem.

(d) *HNL Monitoring System.* The HNL monitoring system shall measure the hourly noise level and shall provide identification of the hour. This system shall be deployed as a community monitoring system. An HNL system consists of two subsystems: a noise level subsystem and an integrator/logger subsystem.

(e) *Noise Level Subsystem.* This term defines a subsystem composed of a microphone, an A-weighted

filter, a squaring circuit and a lag network. This subsystem is used to derive a signal representing the mean square. A-weighted value of acoustic pressure.

(f) *Integrator/Logger Subsystem.* This term defines a subsystem composed of a threshold comparator, an integrator, a clock, an accumulator, a logger or printer, an SENEL comparator (SENEL system only), and a logarithmic converter. This subsystem shall be used to transform the output from a noise level subsystem in excess of a pre-set threshold into SENEL or HNL.

5080.2. *Examples of Possible System Configurations.*

(a) *Approach.* Two systems have been defined: (1) the SENEL monitoring system, and (2) the HNL monitoring system. There are many possible methods of configuring systems to produce SENEL data and HNL data. These systems may be analog systems, digital systems, or combined analog and digital systems. Figures 4 and 5 illustrate two configurations which can provide SENEL and HNL measurements. The system configurations described herein are presented for information only and not as specific design criteria.

(b) *SENEL System Configuration.* An SENEL system may be composed of the following elements:

(1) *Noise Level Subsystem.*

(A) *Microphone.* The microphone converts acoustic data to an equivalent electrical voltage.

(B) *A-Weighting Filter Network.* This filter modifies the voltage from the microphone system so that its frequency characteristics are shaped to an A-weighted, relative response in accordance with weighing curve A in ASA S1.4-1961, or latest revision thereof.

(C) *Squaring Circuit*. This circuit provides a continuous, instantaneous square of the value of the electrical signal delivered from the A-weighting network.

(D) *Lag Network*. This circuit may be a first order lag (single-pole filter) used to smooth the output of the squaring circuit for delivery to subsequent circuits. The lag network provides a slow dynamic characteristic as defined for a sound level meter in ASA S1.4-1961, or latest revision thereof.

(2) *SENEL Integrator/Logger Subsystem*.

(A) *Threshold Comparator*. This device generates an output signal during the time its input exceeds a preset threshold level.

(B) *Integrator*. This circuit provides an output signal which is the definite time-integral of the input signal. The input is a slowly-varying, smooth, unipolar signal delivered from the lag network. The integrator has three operational states: integrate or run, hold, or reset. These states would be controlled by the threshold-comparator. Initially, before the integrator input signal exceeds the threshold signal, the integrator is held in reset. When the threshold is exceeded, the integrator is set in the integrate state, causing the output to be the time-integral of the input. When the input next falls below the threshold, the integrator is set into the hold state. The output of the integrator is, at hold time, the time-integral of the input while it exceeded the measurement threshold. The same signal causing hold would be used to read the

output of the integrator and the true time when the hold command occurred. Following those readings, the integrator would be returned to a reset state.

(C) *Sample and Hold (Optional)*. This circuit may be used to store the value of the integral at the time of integrator hold to minimize the time required for the integrator to be maintained in hold.

(D) *Clock*. This device generates true time which may be directed to a logger upon an integrator-hold command.

(E) *Logarithmic Converter*. This element is used to convert the integrated mean square sound pressure output from the integrator (or sample and hold) into an SENEL having start time and stop time defined by the threshold circuit and a reference duration equal to one second. The reference duration may be introduced as a gain (or loss) term at the input to the log-converter or as a voltage offset at the output from the logarithmic converter.

(F) *SENEL Level Comparator*. The SENEL comparator controls the actual printing/logging operation. If the signal appearing at the output of the logarithmic converter exceeds a pre-determined value, the comparator will issue a print command. If the pre-determined value is not exceeded, the event is not recorded.

(G) *Logging Element*. This element may be a printer which can concurrently or sequentially print out values of true time and SENEL.

(c) *HNL System Configuration.* An HNL system may be composed of the following elements:

(1) *Noise Level Subsystem.* The HNL noise level subsystem is identical to the SENEL noise level subsystem.

(2) *HNL Integrator/Logger Subsystem.* The HNL integrator/logger subsystem is similar to the SENEL subsystem, as noted below.

(A) *Threshold Comparator.* Similar except that the threshold level is adjustable over a different but potentially overlapping range.

(B) *Integrator.* Similar, except that the integrator is controlled in its reset, run, and hold states so that (1) it integrates for some fixed period of time, e.g., 60 seconds, (2) it "holds" only long enough to transfer out the output value for that fixed period integration, and (3) it "resets" only long enough to return the output to zero so that another "integrate" period may be initiated.

(C) *Sample and Hold (Optional).* Similar.

(D) *Clock.* This device controls the timing of the integrator and the accumulator readout.

(E) *Logarithmic Converter (Optional).* This element is used to convert the accumulated integrated noise level to a logarithmic quantity proportional to HNL.

(F) *SENEL Level Comparator.* Not required.

(G) *Logging Element*. Similar, except substitute HNL for SENEL.

(H) *Accumulator*. This device is used to store output of the integrator for all events exceeding the threshold level within a 3600 second period. A print command signal is also provided on the hour to the logger/printer at one hour intervals.

5080.3 Performance Specifications. (a) *Overall Accuracy*. The overall accuracy of both systems shall be ± 1.5 dB when measuring noise from aircraft in flight. It is the intent of the following specifications to verify this accuracy with laboratory simulation.

(b) *Noise Level Subsystem*.

(1) *Frequency Response and Microphone Characteristics*. The frequency response, and associated tolerance of the subsystem, shall be in accordance with IEC Publication 179 entitled "Precision Sound Level Meters," paragraphs 4, 5 and 8 for the A-weighting network, to be superseded by the specifications for the Type 1 precision sound level meter in the latest revision of ASA S1.4-1961, when available.

(2) *Dynamic Range*. The system output shall be proportional to the antilog of the noise level over a noise level range of 60 dB to 120 dB.

(A) For the SENEL subsystem, this range may be covered in 30 dB or greater increments through the use of attenuators. The noise level for each attenuator range shall be at least 40 dB

below full scale. Full scale range shall apply to signals with a crest factor as great as 3:1.

(B) For the HNL subsystem, the internal electrical noise shall not exceed an equivalent input noise level of 50 dB, and the full scale range of 120 dB shall apply to signals with a crest factor as great as 3:1.

(3) *Linearity.* The electrical amplitude response to sine waves in the frequency range of 22.4 Hz to 11,200 Hz shall be linear within one decibel from 30 dB below each full scale range up to 7 dB above the full scale range on any given range of the instrument.

(c) *Integrator/Logger Subsystem.*

(1) *Threshold Comparator.* For SENEL, the threshold level shall be selectable in steps of no greater than 10 dB over a noise level range of at least 60 to 90 dB. For HNL, the threshold level shall be adjustable over a noise level range of at least 55 to 70 dB. In both cases, threshold triggering shall be repeatable with ± 0.5 dB.

(2) *SENEL Comparator.* The maximum allowable SENEL shall be selectable over an SENEL range of 85 to 125 dB. Comparator sensing shall be repeatable within ± 0.5 dB.

(3) *Clock.* The clock shall be capable of being set to the time of day within an accuracy of 10 seconds and shall not drift more than 20 seconds in a 24-hour period. For SENEL, the clock output which identifies the start or stop time of the single event shall be readable within one second.

(4) *End-to-End Accuracy.* The end-to-end accuracy of the integrator/logger subsystem is defined in terms of a unipolar, positive-going square wave input. The logged, integrated output of the system should fall within ± 1 dB of the true value predicted for the wave of a given duration at an amplitude exceeding the measurement threshold by at least 1 dB, and at all higher amplitudes within the range. The square wave shall be applied at the input to the integrator and level comparator.

(A) *SENEL Integrator/Logger Subsystem.*

For square waves defined at all frequencies between 0.025 and 1.0 Hz, the subsystem shall output the SENEL exceeding the maximum allowable SENEL and its time of occurrence to demonstrate end-to-end accuracy.

(B) *HNL Integrator/Logger Subsystem.*

1. For each hour during which no noise event exceeds the HNL system noise level threshold, the subsystem shall output the time on the hour, and indicate that the antilog of the HNL for the preceding hour is zero.

2. The end-to-end accuracy shall be determined over the range of HNL from 45 dB to 95 dB for each combination of the following conditions which gives a value in this range:

a. Square waves, as defined above, shall have durations of 1, 3, 10, 30 and 100 cycles.

b. Square waves shall be at frequencies of 0.025, 0.05, 0.10 and 0.20 Hz.

c. Square waves shall have amplitudes which are equivalent to noise levels of 70, 80, 90, 100 and 110 dB.

(d) *Overall System Accuracy Demonstration.* The overall system accuracy shall be demonstrated for several conditions within each of the following ranges, utilizing a 1000 Hz sinusoidal acoustic plane wave oriented along the preferred plane wave axis of the microphone, or an equivalent signal generated in an acoustic coupler:

(1) SENEL Monitoring System.

(A) The SENEL comparator shall be set at several values of interest, including at least 95, 105, 115 and 125 dB.

(B) The durations of the sinusoidal acoustic signals shall include at least 5, 10, 20 and 40 seconds.

(C) The noise levels for the acoustic inputs at each of the above durations shall be set at levels calculated to produce SENEL's of—
—1.5, +1.5 and +10 dB relative to the SENEL comparator setting.

(2) HNL Monitoring System.

(A) The noise levels for the acoustic inputs shall include at least values of 70, 80, 90 and 100 dB.

(B) The durations of the sinusoidal acoustical signals shall include at least 5, 10, 20 and 40 seconds.

(C) Each of the events defined by the above combinations shall be repeated 1, 3, 10, 30 and 100 times per one hour test to obtain the HNL resulting from such repetition. The HNL accuracy for each combination is defined as the difference between the calculated and measured value for each test. Tests are not required for those combinations which produce a calculated HNL value outside the range of 45 dB to 95 dB.

5080.4 Field Calibration. The monitoring system shall include an internal electrical means to electrically check and maintain calibration without resort to additional equipment. Provision shall also be made to enable calibration with an external acoustic coupler.

5080.5. Environmental Precautions and Requirements. (a) The field instrumentation shall be provided with suitable protection such that the system performance specified will not be degraded while the system is operating within the range of weather conditions encountered at airports within the State of California.

(b) *Humidity.* The effect of changes in relative humidity on sensitivity of field instrumentation shall be less than 0.5 decibel at any frequency between 22.4 and 11,200 Hz in the range of 5 to 100 percent relative humidity.

(c) *Vibration.* The field instrumentation shall be designed and constructed so as to minimize the effects of vibration resulting from mechanical excitation. Shock mounting of the field instrumentation shall be provided as required to preclude degradation of system performance.

(d) *Acoustic Noise.* The field instrumentation shall be designed and constructed so as to minimize effects of vibration resulting from airborne noise, and shall operate in an environment of 125 dB SPL—broadband noise over a frequency range of 22.4 to 11,200 Hz—without degradation of system performance.

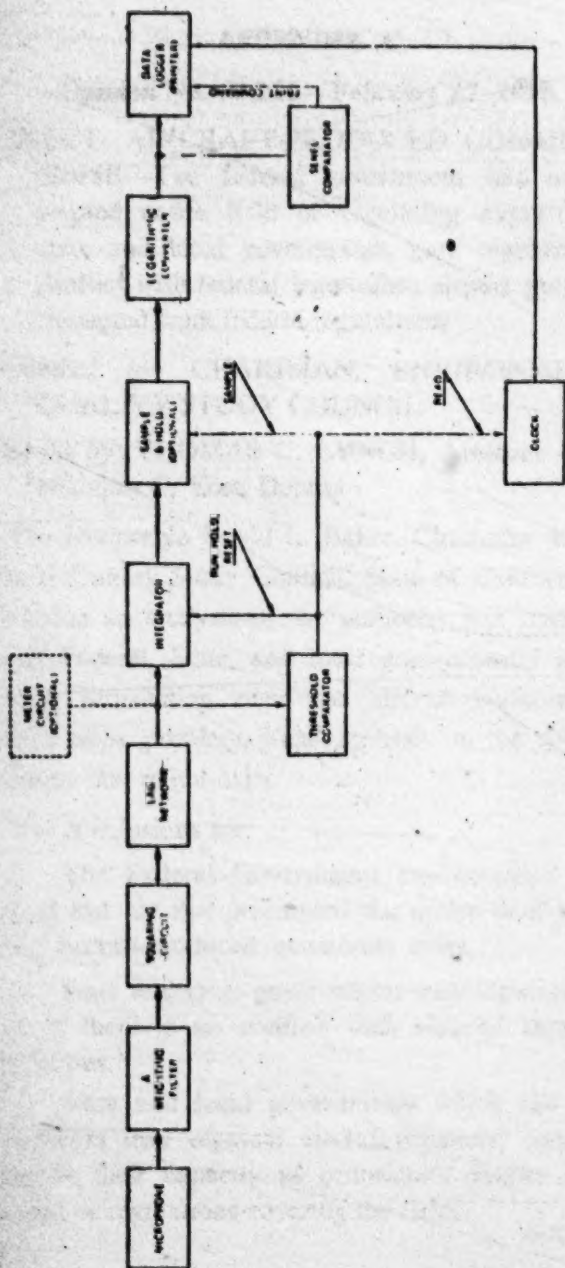


FIGURE 4. TYPICAL SINGLE EVENT NOISE EXPOSURE LEVEL (SENEL) SYSTEM

APPENDIX C.

Opinion No. 69-216—February 27, 1970.

SUBJECT: AIRCRAFT-PRODUCED COMMUNITY NOISE—The federal government has not preempted entire field of regulating aircraft noise; state and local governments may regulate if no conflict with federal legislation; airport proprietors exempted from federal regulations.

Requested by: CHARIMAN, ENVIRONMENTAL QUALITY STUDY COUNCIL

Opinion by: THOMAS C. LYNCH, Attorney General
Nicholas C. Yost, Deputy

The Honorable David L. Baker, Chairman, Environmental Quality Study Council, State of California, has requested an analysis of the authority and responsibility of Federal, State, and local governmental agencies having jurisdiction over the aircraft-produced community noise problem, with emphasis on the voids and overlaps that might exist.

The conclusions are:

1. The Federal Government has occupied a portion of but has not preempted the entire field of regulating aircraft-produced community noise.
2. State and local governments may legislate in the field if there is no conflict with Federal statutes or regulations.
3. State and local governments which are airport proprietors may regulate aircraft-produced community noise in their capacity as proprietors despite Federal statutes or regulations covering the field.

4. State and local governments may regulate aircraft-produced community noise by land use controls such as airport siting and zoning without restriction by the Federal government.

ANALYSIS

The "commerce clause" of the United States Constitution (Art. I, § 8, cl. 3) vests in Congress the power to regulate interstate and foreign commerce. The "supremacy clause" (Art. VI, par. 2) provides that the Constitution and laws of the United States are the supreme law of the land.

The federal regulation of aviation represents Congressional exercise of its power to regulate interstate commerce. See *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 596 (1953); *Rosenhan v. United States*, 131 F.2d 932, 935 (10th Cir. 1942) cert. denied 318 U.S. 790. The regulations adopted thereunder, themselves have the force of law. *McClenny v. United Air Lines, Inc.*, 178 F. Supp. 372, 375 (W.D. Mo. 1959).

When the Federal Government has legislated in a field of interstate commerce, to what extent may states and localities act? They may not do so if the subject is one requiring national uniformity. (*Morgan v. Virginia*, 328 U.S. 373, 386 (1945); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767, 783-784 (1945); *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 185-187 (1938).) When commerce is national in character, requiring a uniform system, Congress may by its inaction indicate its will that the commerce be unregulated. (*Leisy v. Hardin*, 135 U.S. 100, 109-110 (1890).) Generally, the states may act if the federal law has not fully occupied the field (*Kelly v.*

Washington, 302 U.S. 1, 9-14 (1937)), or there is no conflict with the federal legislation (*California v. Zook*, 336 U.S. 725, 733 (1949); *Kelly v. Washington*, supra, pp. 4-8), and if the state law does not discriminate against, substantially obstruct or unreasonably burden interstate commerce (*Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951); *Parker v. Brown*, 317 U.S. 341, 360 (1943); *California v. Thompson*, 313 U.S. 109, 114 (1941); *Buck v. Kuykendall*, 267 U.S. 307, 315 (1924). With the qualifications stated above, the fact that the Federal Government has acted in a field of interstate commerce does not prevent concurrent action by the states. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960); *Southern Pacific Co. v. Arizona*, supra, at 766-767; *Cooley v. Board of Wardens*, 53 U.S. 298, 318-320 (1851); see 24 Ops. Cal. Atty. Gen. 129.

The essential question is the degree to which federal legislation under the commerce clause has precluded state and local governments from acting.

To what extent has the Federal Government acted? The Federal Airport Act of 1946 granted authority to the Federal Government, through the Federal Aviation Agency (FAA), to control the development of airports. 49 U.S.C. §§ 1101-1120; see 49 U.S.C. § 1655(c) regarding transfer of functions. As amended to date the act directs the Federal Aviation Administrator to formulate and annually revise a National Airport Plan which is to specify in terms of general location and type of development, projects the Administrator considers necessary to provide a system of public airports to meet the needs of civil aviation. 49 U.S.C. § 1102. The act further authorizes the Administrator to make financial grants to public agencies to establish

a nationwide system of public airports in conformity with the National Plan. 49 U.S.C. § 1103; see 49 U.S.C. §§ 1349-1350. The legislative history refers to the goal of the 1946 act as "a national system of airports independently located and planned for the integrated use of the nation." U.S. Cong., House, II Legislative History of Federal Airport Act, 1958, at 576.

The Federal Aviation Act of 1958 charges the Federal Aviation Administrator with the duty to make plans and policy with respect to development and use of the navigable airspace and to assign and regulate its use. 49 U.S.C. §§ 1348, 1353; see 49 U.S.C. §§ 1655(c) and 1657(f) with respect to transfer of functions. The act also declares that the United States possesses and exercises "complete and exclusive national sovereignty in the airspace of the United States, . . ." 49 U.S.C. § 1508. It further recognizes that there exists on behalf of any United States citizen a "public right of freedom of transit" through the nation's navigable airspace. 49 U.S.C. § 1304; see 49 U.S.C. § 1301(24).

The Federal Aviation Administrator is charged with the duty of prescribing air traffic rules and regulations governing the flight of aircraft for the navigation, protection, and identification of aircraft, the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace. 49 U.S.C. § 1348(c). This includes rules as to safe altitudes of flights and rules to prevent collision between aircraft and other aircraft, land or water vehicles, and airborne objects. *Ibid.*

The Administrator is further charged with the duty of adopting rules and regulations to promote safety of

flight. 49 U.S.C. § 1421(a). These include rules concerning aircraft design, materials, workmanship, construction, and performance, appliance standards, inspection standards, reserve supplies, maximum hours of work, and national security and safety in air commerce. *Ibid.*

The Administrator is authorized to issue air carrier operating certificates and establish minimum safety standards for the operation of any carrier to whom such a certificate has been issued. 49 U.S.C. § 1424. He also issues airman certificates and aircraft certificates. 49 U.S.C. §§ 1422-1423.

The Administrator is further authorized to acquire, establish, improve, inspect, classify, and rate air navigation facilities including airports and weather dissemination, signaling, radio-directional finding, radio, and other electrical communication equipment. 49 U.S.C. §§ 1348(b), 1426; *see* 49 U.S.C. § 1301(8).

The Administrator may, in consultation with the Department of Defense, establish airspace zones where aircraft are restricted or prohibited. 49 U.S.C. § 1522.

A 1968 amendment to the Federal Aviation Act of 1958 directs the Administrator to prescribe and amend standards for the measurement of aircraft noise and sonic boom and to prescribe and amend rules and regulations "to provide for the control and abatement of aircraft noise and sonic boom, . . ." 49 U.S.C. § 1431(a). The criteria which the Administrator is mandated to consider include research, safety, economic reasonableness, and technological practicability. 49 U.S.C. § 1431(b).

Regulations have been adopted pursuant to the Federal Aviation Act of 1958 governing airspace (14

C.F.R. Pts. 71-77), air traffic and general operating rules (14 C.F.R. Pts. 91-105), air carriers (14 C.F.R. Pts. 121-137), schools (14 C.F.R. Pts. 141-419), airports (14 C.F.R. Pts. 151-167), and navigation facilities (14 C.F.R. Pt. 171). Specific include regulations governing designation of federal airways (14 C.F.R. Pt. 71), establishment of jet routes (14 C.F.R. Pt. 75), objects affecting navigable airspace (14 C.F.R. Pt. 77), general operating and flight rules (14 C.F.R. Pt. 91) (which include minimum safe altitudes [14 C.F.R. §§ 91.79, 91.119] and operates at airports [14 C.F.R. §§ 91.87-91.89]), special air traffic rules and airport traffic patterns (for certain specified airports) (14 C.F.R. Pt. 93), instrument flight rule altitudes (14 C.F.R. Pt. 95), and standard instrument approach procedures (14 C.F.R. Pt. 97).

In November, 1969, the FAA added Part 36, Noise Standards: Aircraft Type Certification, to the Federal Aviation Regulations. 34 Fed. Reg. 18355-18379, Nov. 18, 1969; see 34 Fed. Reg. 19025, Nov. 29, 1969. These regulations are restricted in their application to prescribing noise standards for type certification of new subsonic aircrafts, but represent the initiation of the noise abatement regulatory program authorized by 14 U.S.C. § 1431. 34 Fed. Reg. 18355, Nov. 18, 1969.

The Federal Aviation Act of 1958 by its terms is not intended to be exclusive:

"Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."
49 U.S.C. § 1506.

This provision appears to permit state as well as federal remedies in addition to the Federal Aviation Act.

The legislative history of the 1968 noise amendments to the Federal Aviation Act makes clear that Congress did not intend to occupy the field of noise regulation to the absolute exclusion of state and local regulation. As stated in the Senate Committee report:

"It is not the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local governments." S. Rep. No. 1353, July 1, 1968, U.S. Code Cong. and Adm. News (1968), 2688, 2693.

There is no question but that states and localities may not in their legislative capacities pass legislation in direct conflict with Federal legislation. The two municipal attempts at such legislation have both been invalidated by the courts. *Allegheny Airlines v. Cedarhurst*, 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd* 238 F.2d 812 (2d Cir. 1956); *American Airlines, Inc. v. Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd* 398 F.2d 369 (2d Cir. 1968), *cert. denied* 393 U.S. 1017 (1969).

Cedarhurst, a Long Island community near what was then called Idlewild Airport (now John F. Kennedy) attempted to prohibit by ordinance air flights over the village at less than 1,000 feet. In *Allegheny Airlines v. Cedarhurst*, *supra*, 132 F. Supp. 871 (E.D.N.Y. 1955), the Federal District Court invalidated the ordinance on grounds of preemption by provisions of federal law and regulations. The United States Court of Appeal for the Second Circuit affirmed

this decision. *Allegheny Airlines v. Cedarhurst*, 238 F.2d 812 (2d Cir. 1956). In its opinion the court stated that the federal government had preempted the field of regulation of aircraft flight. *Id.* at 814.

Hempstead, another Long Island town near John F. Kennedy International Airport, adopted an ordinance imposing noise limitations on aircraft overflights. This too was invalidated. *American Airlines, Inc. v. Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967). The court found that the effect of the ordinance was to deny the carriers approach, takeoff, and flight rights at levels granted them by the Federal Aviation Act of 1958 and the regulations adopted thereunder. There was a direct conflict between Federal and municipal action. The Court of Appeal for the Second Circuit affirmed. *American Airlines, Inc. v. Hempstead*, 398 F.2d 369 (2d Cir. 1968); cert. denied, 393 U.S. 1017 (1969).

In both *Cedarhurst, supra*, and *Hempstead, supra*, there was in fact direct conflict between the federal regulations and the municipal ordinances. *Allegheny Airlines v. Cedarhurst*, 238 F.2d 812, 814; *American Airlines, Inc. v. Hempstead*, 398 F.2d 369, 372-375. There are no reported holdings pertaining to the constitutionality of local regulations of aircraft noise which do not conflict with federal regulations.

The senate committee report that is part of the legislative history of the 1968 noise amendment states that insofar as regulation "involves controlling the flight of aircraft" the field is already preempted by the Federal Government. Senate Report No. 1353, *supra*, at 2693-2694. The California Supreme Court has disagreed with that assumption. In *Loma Portal Civic Club v. American Airlines, Inc.*, 61 Cal. 2d 582, 591, the court stated that it was not persuaded of the soundness

of the contention that state action affecting any aspect of flight operations is precluded by the extensive pattern of federal regulations in this field. The court noted that states may tax aircraft in interstate commerce and that state courts may entertain wrongful death actions against airlines, *Id.* at 593. The court further noted that the United States Supreme Court upheld a city's application of its antismoke ordinance to a ship in international commerce although the vessel's boiler was built in compliance with federal requirements and had received federal approval after inspection, *Ibid.* The California court quoted the United States Supreme Court to the effect that absent a clear holding by the latter court that federal jurisdiction has been made exclusive, state courts will not abdicate their jurisdiction. *Id.* at 591; see Wright, *The Law of Airspace*, 201-202; *Gardner v. County of Allegheny*, 114 A.2d 491, 497-498 (S.C. Pa. 1955); *Southeastern Aviation, Inc. v. Hurd*, 355 S.W.2d 436, 439-440 (S.C. Tenn. 1962), *appeal dismissed*, 371 U.S. 21.

The question whether states or localities may pass legislation affecting aircraft flight which conflicts with federal laws and regulations has been answered negatively. The question whether states or localities may pass legislation affecting aircraft flight which does not conflict with federal laws and regulations has not been answered definitively. The United States Court of Appeals for the Second Circuit in *Cedarhurst, supra*, and the California Supreme Court in *Loma Portal, supra*, have made conflicting statements in dicta. See *American Airlines, Inc. v. Town of Hempstead*, 398 F.2d 369, 376 n.4. While we find the reasoning of the California Supreme Court in *Loma Portal, supra*, persuasive, the question must ultimately be answered by the United States Supreme Court.

There exists one generally recognized exception to federal preemption—the power of the airport proprietor. Without violation of either the commerce or the supremacy clause, the owner of an airport has the right as landowner to decide who is to use his airport and under what conditions. *See Griggs v. Allegheny County*, 369 U.S. 84 (1962) (holding county as airport proprietor liable for damages caused by overflights).

The legislative history of the 1968 noise amendments to the Federal Aviation Act and the FAA have acknowledged the existence of this exception to federal powers. In the words of the Senate report:

"However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is non-discriminatory. . . . In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations." (Senate Report No. 1353, *supra*, 2694.)

The FAA has consistently acknowledged the powers and responsibilities of airport proprietors in the field of noise. The FAA's Notice of Proposed Rule Making

issued with the first proposed rules under the 1968 noise amendment states the following:

"[T]his notice does not promise a federal substitute for the actions that airport operators, as proprietors, can take and have traditionally and responsibly taken to make their airports fit the particular needs of their locales, such as establishing the conditions under which their airports and airport facilities may be used, including the issuance of specific noise ceilings." (34 Federal Register 457, Jan. 11, 1969.)

In adopting the aircraft type certification noise standards the FAA notice stated:

"Relation to responsibility of airport proprietors. Compliance with Part 36 is not to be construed as a Federal determination that the aircraft is 'acceptable,' from a noise standpoint, in particular airport environments. Responsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport. The noise limits specified in Part 36 are the technologically practicable and economically reasonable limits of aircraft noise reduction technology at the time of type certification and are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits or air commerce. This limitation on the scope of Part 36 is required for consistency with the responsibilities placed upon the airport proprietor by the U.S. Supreme Court in

Griggs v. Allegheny County, 369 U.S. 84 (1962). Consistent with this limited scope, this amendment specifies that the Federal Aviation Administration makes no determination, under Part 36, on the acceptability of the prescribed noise levels in any specific airport environment (see §§ 36.5 and 36.1581(a)). . . . [T]he FAA, in response to the *Griggs* decision (see above), recognizes the right of State or local public agencies, as the proprietors of airports, to issue nondiscriminatory restrictions with respect to the permissible level of noise that can be created by aircraft using their airports. However, the FAA does not recognize any right of any State or local government agency that is not an airport proprietor to issue any regulation controlling the flight of aircraft for noise purposes." 34 Federal Register 18355-18356, Nov. 18, 1969.

Most commercial airports in the United States, including most of those in California, are publicly owned. (*Id.* at 18356.) One major airport proprietor has adopted noise regulations in terms of perceived noise levels, the Port of New York Authority (which has proprietary authority over Kennedy, La Guardia, Newark and Teterboro Airports). Airport Rules and Regulations Rules 32010-06; Port of New York Authority, Terms and Conditions for the Operation of Jet Aircraft. Its regulations restricting runway use (despite FAA permission to use those runways) have been upheld against an airline's attack. *Port of New York Authority v. Eastern Airlines, Inc.*, 259 F. Supp. 745 (E.D.N.Y. 1966).

There is therefore no bar to governmental entities which own or lease airports imposing noise restrictions

in their proprietary rather than legislative capacity. (Regarding FAA approved methods, see Hoover and Cochran, FAA, *Airport Design and Operation for Minimum Noise Exposure* (1969), 12-13; Sperry, Powers, and Oleson, FAA, *The Federal Aviation Administration Aircraft Noise Abatement Program* (1968), 21-23.)

In 1969 the State of California enacted legislation directed at airport owners in their proprietary capacity which will establish noise limits by state regulation for each airport in the state. These regulations must be adopted by April, 1970, and will be effective, unless repealed by the Legislature, in January, 1971. Public Util. Code § 21669, *et seq.*; Stats. 1969, ch. 1585, p. 3222. The effect will be to establish noise limits around California's airports without conflict with the Commerce Clause.

Community noise may also be regulated through land use controls by creating a buffer area between the runway and the community. This may be done by airport siting, by condemning more land for the airport (so as to create an airport owned buffer), or by zoning (so as to limit usage of buffer land to uses compatible with aircraft noise).

None of these methods of reducing aircraft produced community noise raises any question of federal preemption. See: 34 Fed. Reg. 457, January 11, 1969. Federal policy is to encourage local zoning. See 49 U.S.C. §§ 1108(b), 1110(3), and 1110(4). The Federal Housing Act of 1954 makes funds available through the Housing and Home Finance Agency for community planning including airports. 40 U.S.C. § 461. The Federal Airport Act of 1946 provides for

federal grants in aid for planning within airport boundaries. 49 U.S.C. § 1101 *et seq.*

Community noise control through airport siting is not a matter of specific regulation by any governmental entity. Federal site approval is contingent primarily upon questions of safety. See 49 U.S.C. §§ 1108, 1110, 1349, 1350. The approval of California's Department of Aeronautics of a site application is made mandatory upon compliance with safety criteria and the Department's rules and regulations. Pub. Util. Code § 21666; see 32 Ops. Cal. Atty. Gen. 235. Those rules and regulations do not refer to community noise, but do require compliance with local zoning regulations. Title 4, Calif. Admin. Code § 3535 *et seq.*; Calif. Admin. Register 69, No. 39, § 3525 *et seq.* Siting precluding community noise could legally be required of the Department of Aeronautics by statute. See Pub. Util. Code § 21666. Regulations to that effect could be adopted by that Department without further legislation. See Pub. Util. Code §§ 21243, 21244, 21666. A locality by its zoning could also exclude an airport. Calif. Admin. Register 69, No. 39, §§ 3531(a)(1), 3558; see Govt. Code § 26027.

Community noise may be regulated by the airport proprietor's acquiring more land. A larger airport increases the distance between the noise source and the community. This mechanism does not raise jurisdictional questions.

A county or city may make and enforce within its limits all such local, police, sanitary or other regulations as are not in conflict with general laws. Cal. Const. Art. XI, § 11. This section permits the adoption of zoning regulations not in conflict with state law.

Johnston v. Bd. of Sup. of Marin County, 31 Cal. 2d 66. The state has legislated in the field of airport zoning, permitting a city or county to regulate the structures of buildings near airports. Govt. Code § 50485 *et seq.*; see *Morse v. San Luis Obispo County*, 247 Cal. App. 2d 600, rehear. den., hear. den.; *Sneed v. County of Riverside*, 218 Cal. App. 2d 205; Comment, *Airport Approach Zoning*, 12 U.C.L.A. Law Rev. 1451. The Airport Approaches Zoning Law by its own terms is not intended to preempt local regulation. Govt. Code § 50485.14. A city, county, or airport district may acquire an air easement above the surface of property by eminent domain. Code of Civ. Proc. §§ 1239.2-1239.4. The State Department of Aeronautics has statewide jurisdiction to approve or disapprove the erection of any structure within the state over 500 feet high. Pub. Util. Code §§ 21656-21657. Unless permitted by the department, structures constituting hazards to air navigation within one mile of airports are barred. Pub. Util. Code § 21659. The Department of Aeronautics also makes financial grants to public agencies owning and operating airports contingent upon appropriate airspace control and height restrictions. Pub. Util. Code § 21688.

The state may legislate further in the field of zoning around airports, and localities may act to the extent the state has not acted, and, if the state has acted, to the extent the state reserved to localities the power to take further action.

The answer to the request for analysis by the Environmental Quality Study Council has necessarily been general since the request was general. More concrete answers must await specific fact situations.

OCT 31 1972

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1972
No. 71-1637

THE CITY OF BURBANK, et al.,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., et al.,

Appellees.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

MOTION TO AFFIRM

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Appellees.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

MOTION TO AFFIRM

Pursuant to Supreme Court Rule 16, appellees move that the final judgment of the United States Court of Appeals for the Ninth Circuit be affirmed without further argument on the ground that the decision below is manifestly correct.

OPINIONS BELOW

The opinion of the court of appeals, reported in 457 F.2d at 667, is set forth in Appendix A to the appellants' jurisdictional statement. The district court opinion is

reproduced in Appendix C of the supplement to the appendix of the jurisdictional statement ("Supp. App.") and reported in 318 F. Supp. at 914. The findings of fact and conclusions of law made by the district court are in Appendix D of the supplement.

QUESTIONS PRESENTED

1. Was the court of appeals correct in holding that the Burbank curfew ordinance is invalid under the Supremacy Clause because the city is purporting to exercise its police power in an area which has been preempted by the federal government?

2. Was the court of appeals correct in holding that the Burbank curfew ordinance is invalid under the Supremacy Clause because the ordinance is in conflict with an order of the Federal Aviation Administration applicable to nighttime flight operations at the Hollywood-Burbank Airport and with the federal statutory right of free transit through the navigable airspace?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Art. VI, cl. 2 of the United States Constitution, reads as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;

* Should the Court note probable jurisdiction, the following additional issues would be presented and briefed: (a) Does the Burbank ordinance constitute an invalid attempt to regulate a phase of the national commerce which, because of the need of national uniformity, demands that its regulation be prescribed by a single authority; or (b) does the burden imposed on interstate commerce by enforcement of a local curfew render the Burbank ordinance invalid? In addition to holding the ordinance invalid on the Supremacy Clause grounds, the district court reached these Commerce Clause issues and answered each in the affirmative. The court of appeals did not find it necessary to go beyond the Supremacy Clause.

and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Burbank ordinance No. 2216 (the "curfew ordinance"), held invalid below, added section 20-32.1 to the Burbank Municipal Code. It provides as follows:

"Sec. 20-32.1 Aircraft Take-Offs.

"(a) Pure Jets Prohibited from Taking Off Between 11:00 P.M. and 7:00 A.M.

"It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(b) Airport Operator Prohibited from Allowing Take-Offs.

"It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(c) Exception: Emergencies.

"This Section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off."

STATEMENT

1. Nature of the Case and Prior Proceedings.

This is an appeal under 28 U.S.C. § 1254(2) from a decision of the United States Court of Appeals for the Ninth Circuit entered on March 22, 1972, which unani-

mously affirmed a judgment of the United States District Court for the Central District of California. The judgment declared invalid an ordinance of the City of Burbank which purports to impose a night curfew on jet aircraft takeoffs at Hollywood-Burbank Airport. Appellants are the City of Burbank and various of its officials responsible for enforcement of the ordinance. Appellees are Lockheed Air Terminal, Inc., owner and operator of the Hollywood-Burbank Airport, Pacific Southwest Airlines, an intrastate carrier, and the Air Transport Association of America, an unincorporated trade association consisting of some thirty-two United States scheduled interstate air carriers.

On March 31, 1970, the City Council of Burbank passed the curfew ordinance prohibiting takeoffs of jet aircraft from the Hollywood-Burbank Airport between 11:00 p.m. and 7:00 a.m. Following the effective date of the ordinance, Lockheed Air Terminal, Inc., the airport owner, and Pacific Southwest Airlines filed this action in the United States District Court for the Central District of California seeking to have the ordinance declared unconstitutional and to enjoin its enforcement. The Air Transport Association of America was permitted to intervene as a plaintiff. The Federal Aviation Administration appeared *amicus curiae* in support of plaintiffs, and the State of California appeared in that capacity in support of defendants.

On September 24, 1970, after trial, the district court (Crary, J.) filed a memorandum opinion holding that the plaintiffs were entitled to declaratory and injunctive relief on both Supremacy Clause and Commerce Clause grounds. Supp. App. C. On November 30, 1970, the district court signed and filed its findings of fact and conclusions of law, Supp. App. D, and entered its judgment declaring the Burbank ordinance unconstitutional, illegal and void and enjoining its enforcement. R. 405.

Burbank sought review in the Ninth Circuit. Again, the Federal Aviation Administration and the State of California participated as *amici*. On March 22, 1972, the court (Browning, Duniway and Trask, J.J.) issued its opinion affirming the judgment of the district court.

2. The Relevant Facts.

The district court's detailed Findings (Supp. App. D), which are summarized below, provide the best available picture of the factual setting of this case. Appellants' "Statement of the Case" largely ignores the findings and fails to deal adequately with the facts relevant to the issues presented by this appeal.

(a) *The Hollywood-Burbank Airport*. Hollywood-Burbank Airport was dedicated on May 30, 1930, and has been in use since that time by regularly scheduled commercial aircraft and privately owned corporate and general aviation aircraft. The major portion of the Airport is within the City of Burbank, which has a population of 95,000. F.F. 6-7, Supp. App. at 37-38. It is the most convenient airport in the greater Los Angeles metropolitan area for the entire San Fernando Valley, Hollywood, and the cities of Burbank, Glendale, Pasadena and Alhambra, an area containing a population of 2.2 million persons. F.F. 14, Supp. App. at 40.

Hollywood-Burbank Airport is an important "satellite" airport in the national air transportation system.* It is included in the National Airport Plan promulgated by the Administrator of the Federal Aviation Adminis-

* Satellite airports, such as Hollywood-Burbank or Oakland International and San Jose Municipal in the San Francisco area, plan an essential role in the national air transportation system in relieving air and ground congestion, in reducing air-traffic delays at primary or "hub" airports, and in providing more convenient service to the surrounding population centers. This role has been recognized by the Civil Aeronautics Board in its route investigations. F.F. 11, 13, Supp. App. at 39; PX 35, at pp. 6-7; e.g., Pacific Northwest-California Investigation, C.A.B. Docket No. 18884, CCH Av. L. REP. ¶ 21, 932 (May 12, 1970).

tration pursuant to the Federal Airport Act of 1946, ch. 251, 60 Stat. 170, and forms a vital link in interstate and intrastate air commerce. F.F. 14, 17, Supp. App. at 40. In 1969 there were approximately 32,000 air carrier movements at Hollywood-Burbank Airport serving 1,178,000 commercial passengers in interstate and intrastate transportation. Approximately 97 percent of these operations were conducted by jet aircraft. F.F. 20, Supp. App. at 42.

(b) *The Curfew Ordinance.* Following enactment, Burbank city officials publicly announced their intention to enforce the ordinance. F.F. 9, Supp. App. at 39. Immediately, the curfew ordinance required PSA to cancel a regularly scheduled flight which it had operated for over two years serving an average of 125 passengers, 80 of whom were boarding at Hollywood-Burbank Airport. F.F. 61, Supp. App. at 54. And although Continental Air Lines was granted new authority from the CAB to commence regularly scheduled interstate service from Hollywood-Burbank Airport to Portland and Seattle, the curfew ordinance prevents Continental from filling out its service pattern by the addition of a southbound after-dinner flight. F.F. 65-66, Supp. App. at 55.

(c) *The Scope of Federal Regulation.* The Findings provide a comprehensive summary of the pervasiveness of federal regulation of all aspects of the use of the navigable airspace and aircraft operations generally and at Hollywood-Burbank Airport. The federal statutes and regulations governing air carrier operations are described in Findings 23-27; those with respect to certification of aircraft, airmen and airports are in Findings 28-33; those with respect to the framework of federal centralized management and control of navigable airspace are in Findings 34-40; those covering federal control of all aspects of aircraft flight operations are in Findings 41-47; those relating to the exercise of centralized management and control directed to achieving the

maximum efficient use of the navigable airspace, including flow control and high density traffic airport regulations, are in Findings 48-53; and those covering federal regulation of aircraft noise abatement are in Findings 54-57.

Each scheduled interstate air carrier that uses Hollywood-Burbank Airport holds a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board, which authorizes and obligates the carrier to engage in air transportation and to provide adequate service with respect to persons, property and mail over specified routes. F.F. 24, Supp. App. at 42. The Operations Specifications issued by the FAA to each scheduled air carrier require these carriers to operate their turbo-jet aircraft within the navigable airspace in accordance with instrument flight rules (IFR) and specifically authorize the use of Hollywood-Burbank Airport. F.F. 27, Supp. App. at 43.

Every portion of the flight of a commercial jet aircraft takes place under the direct control of an FAA facility, from the filing of a flight plan, through the assignment of a runway and clearance to taxi thereto, the takeoff clearance, the assignment of a standard instrument departure procedure and a radio beam intersection to which to fly, to the assignment of a standard instrument approach procedure and clearance to approach for landing on an assigned runway. F.F. 41-47, Supp. App. at 46-50.

(d) *The Efficient Use of Airspace.* In exercising centralized management and control over the navigable airspace of the United States, the FAA has as one of its statutory goals the efficient use of this airspace, which includes the expeditious movement of aircraft. A variety of techniques are used by the FAA to insure efficient use of the presently congested airspace, including the utilization of centralized flow control procedures and high density airport rules which are discussed, respectively,

in Findings 51-52 and 53-54 (Supp. App. at 50-52). F.F. 49-50, Supp. App. at 50.

As an aspect of effective airspace management, Lockheed is subject to federal regulation as owner and proprietor of Hollywood-Burbank Airport. The Federal Aviation Act of 1958 prohibits the establishment or construction of civil airports not receiving federal funds, such as Hollywood-Burbank, or even the substantial alteration of a runway layout, without prior compliance with regulations prescribed by the Administrator. 49 U.S.C. § 1350. This requirement was established "in order to assure conformity to plans and policies for, and allocation of, airspace by the Administrator. . . ." *Id.* The FAA also directly regulates Lockheed, as well as other airport operators, through the terms of the airport operator's certificate, without which no airport can serve carriers certificated by the CAB. F.F. 33, Supp. App. at 44; 49 U.S.C. §§ 1430(a)(8), 1432.

(e) *Noise Abatement Regulations.* Actions taken by the FAA to achieve noise abatement at airports generally are summarized in Findings 54, 55 and 57. Supp. App. at 52-53. Prior to the enactment of the Burbank curfew ordinance, the FAA took in hand the subject of nighttime takeoffs at Hollywood-Burbank Airport and acted to minimize the consequences of such operations by issuing the noise abatement order summarized in Finding 56. Supp. App. at 53. This order, which was issued by the FAA Chief of the Burbank Air Traffic Control Tower, establishes a preferential runway for departures of jet aircraft between the hours of 11:00 p.m. and 7:00 a.m. In issuing this order the responsible federal official announced his determination that the noise abatement procedures which it established were "designed to reduce community exposure to noise to the lowest practicable minimum." PX 30.

The FAA also employs its noise abatement authority in the field of aircraft design and performance. On November 18, 1969 regulations were adopted prescribing noise standards which must be met as a condition of type certification for new subsonic turbojet aircraft. 34 Fed. Reg. 18355, now published at 14 C.F.R. Part 36. And on October 30, 1970, the Administrator issued an Advance Notice of Proposed Rulemaking concerning "civil airplane noise reduction retrofit requirements." 35 Fed. Reg. 16980.

(f) *Effect on Commerce.* The district judge found that air commerce, by reason of its speed and volume, requires regulation by a single authority if it is to be conducted with maximum safety and so as to achieve efficient use of the navigable airspace. F.F. 59, C.L. 21, Supp. App. at 54, 66. The evidence was uncontradicted that air transportation problems are not amenable to solution by local regulation. Supp. App. at 29.

The district judge also found, upon the basis of uncontradicted testimony, that if the curfew ordinance were upheld, similar ordinances would be adopted by virtually all cities surrounding airports. F.F. 69, Supp. App. at 56. Such a proliferation would adversely affect the aviation industry, the members of the traveling public, and the national economy. F.F. 70, Supp. App. at 57. The imposition of curfew ordinances on a nationwide basis, the court found, would (1) drastically restrict the hours available for flight scheduling far beyond the curfew period, (2) severely impair the efficiency of the aircraft maintenance system, (3) require extensive re-scheduling at enormous inconvenience and expense, (4) deteriorate air transportation service to the public, (5) increase the already serious congestion problem, and (6) intensify the noise problem in the hours immediately preceding the curfew, which is the period of greatest

annoyance to surrounding communities.* F.F. 67-68, 70-82, Supp. App. at 56-61. In sum, interstate commerce would be subjected to an unreasonable burden and interference. F.F. 83-84, Supp. App. at 61.

3. Decision of the District Court.

The district court held that the federal government has preempted the field of regulations governing and controlling the use of airspace and air traffic. From its analysis of the federal statutes and regulations, the court concluded that "Congress intended to centralize full and dominant control of the navigable air space in the Federal Government so as to provide for its safe and most efficient use." Supp. App. at 22. The court also held that local curfew legislation "would conflict with the certificated rights and obligations" of the air carriers. *Id.* at 28.

The district court also ruled that the Burbank ordinance would violate the Commerce Clause in two respects. First, based upon its holding that the effect of the ordinance is to be considered on a "national basis," the court held that the ordinance cannot stand because there would be a "very serious loss of efficiency as to the use of air space" and the carriage of interstate passengers and goods would be "seriously interrupted." Supp. App. at 28. Second, the trial court held that "air commerce, by reason of its speed and volume, requires a single authority in control if it is to be conducted at

* Each day, some 1,009 scheduled domestic interstate departures occur throughout the United States between 11:00 p.m. and 7:00 a.m., and all these flights would have to be cancelled if a curfew were imposed on a nationwide basis. F.F. 74, Supp. App. at 58. Continental Air Lines alone would have to cancel over 48 flights per day, and its operating costs would be increased by approximately 25 percent. F.F. 71-72, Supp. App. at 57. Other carriers would be similarly affected. F.F. 73, Supp. App. at 57.

Over 48 percent of the nation's air mail is carried during curfew hours. Nationwide imposition of a curfew would annually delay billions of pieces of mail at least one day in delivery.

(Footnote continued on next page.)

maximum safety and efficient use of the navigable air space." *Id.* at 29.

4. Decision of the Court of Appeals.

On March 22, 1972 the Ninth Circuit ruled the Burbank curfew ordinance invalid under the Supremacy Clause, finding it unnecessary to reach the Commerce Clause issue.

With respect to preemption, the court of appeals found that the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1301-1542, created a comprehensive scheme to deal with air commerce at the federal level and that the overall design of Congress was to centralize in a single authority the power to promulgate rules and regulations for the use of the nation's airspace. The court found that Congress, in amending the Act in 1968, 49 U.S.C. § 1431, underscored federal preemption of the field of aircraft noise regulation so as to exclude the exercise of State and local police power in this area. App. at 11-14.

The Ninth Circuit also held that the Burbank curfew ordinance conflicted with the federal scheme of aviation regulation when tested by the standards of *Perez v. Campbell*, 402 U.S. 637 (1971), because it "interferes with the balance set by the FAA among the interests with which it is empowered to deal" App. at 18. The circuit noted that at the time the Burbank ordinance was passed, the FAA had already issued and put into effect preferential runway use procedures with respect to night operations designed to reduce aircraft noise in the vicinity of the Hollywood-Burbank Airport to "the lowest practicable minimum." The court held that the attempt by the City of Burbank to go beyond the noise abatement measures adopted by the FAA "frustrates the full accom-

F.F. 79, Supp. App. at 59. In addition, the air freight industry, which exists upon its ability to operate during curfew hours, would be required to cancel approximately 42 percent of the all-cargo services. F.F. 80-81, Supp. App. at 59-60.

plishment of the goals of Congress." *Id.* In addition, the court ruled that the effect of the curfew was to terminate the federal statutory right of free transit through the navigable airspace. *Id.* n.12. Judge Browning limited his concurrence to the conflict portion of the opinion.

ARGUMENT

A. Introduction and Summary.

The decision of the court of appeals is so plainly correct that it should be summarily affirmed without further argument. The Supremacy Clause requires affirmance both because the local regulation operates in an area preempted by the federal government and because it directly conflicts with federal action taken at the airport. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (preemption); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 40 U.S.L.W. 3479 (U.S. April 4, 1972) (preemption); *Perez v. Campbell*, 402 U.S. 637 (1971) (conflict).

As to preemption, the comprehensive Federal Aviation Act of 1958, as amended, 49 U.S.C. §1301, *et seq.*, displays an unmistakable congressional intention to occupy completely the fields of the regulation of aircraft operations and the use of navigable airspace. The 1968 amendment to the Act, 49 U.S.C. § 1431, makes explicit the FAA's responsibility with respect to the regulation of aircraft noise. And the federal statutory scheme has been elaborated upon by regulations rightly described as being "of formidable proportions, impressive detail, and manifest sophistication."* As the court of appeals said, the conclusion of preemption is "unavoidable."

* *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226, 232, (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969).

The Burbank curfew ordinance intrudes into this exclusive federal domain. For the purpose of restricting aircraft noise, it would deny jet aircraft access to the navigable airspace for fully one-third of each day.* Federal occupation of the field precludes local bodies from exercising their police powers in this manner. Whether an airport operator could adopt comparable regulations in the exercise of its powers as a proprietor is not in issue in this case, since Burbank was attempting to exercise its police power with respect to an airport it neither owns nor operates.

Apart from the preemption issue, the holding of the court of appeals should be affirmed because of the clear and direct "conflict" between the Burbank ordinance and an FAA order. At the time the ordinance was enacted, aircraft operations at Hollywood-Burbank Airport were already subject to an FAA noise reduction order (BUR 7100.5B) which established a preferential runway system for departures between 11:00 p.m. and 7:00 a.m. The Burbank ordinance would make a nullity of the FAA order and would, as the court of appeals unanimously held, conflict and interfere with the balance set by the FAA among the interests with which it is empowered to deal. In addition, the curfew would interfere with the federally guaranteed right of free transit through the navigable airspace. The Supremacy Clause bars a local enactment which would so frustrate the full accomplishment of the goals of Congress. *Perez v. Campbell*, 402 U.S. at 649.

* The impact of such an ordinance on airline scheduling extends well beyond the period of any particular curfew and beyond the boundaries of the regulated airport. For example, the Burbank ordinance alone restricts the period that Continental may originate departures from Seattle to twelve hours of the day. F.F. 68, Supp. App. 55-56. And if curfews were adopted nationwide, departures between widely separated cities would be limited to less than one-third of the hours of the day. F.F. 68, Supp. App. at 56.

The supremacy of federal law with respect to aircraft operations and use of the navigable airspace has been upheld in an unbroken line of federal decisions. *American Airlines, Inc. v. City of Audubon Park, Kentucky*, 297 F. Supp. 207 (W.D. Ky. 1968), *aff'd*, 407 F.2d 1306 (6th Cir.), *cert. denied*, 396 U.S. 845 (1969); *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969); *Allegheny Airlines v. Village of Cedarhurst*, 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd*, 238 F.2d 812 (2d Cir. 1956); *United States v. City of New Haven*, 447 F.2d 972 (2d Cir. 1971). The long established federal supremacy in this field, underscored as to aircraft noise by the explicit 1968 amendment to the Act, warrants affirmance of the ruling below without further argument.

B. The Preemption Issue.

In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), this Court stated, in the disjunctive, the classic tests for determining whether federal legislation has pre-empted a given field:

"[i] The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. [ii] Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. [iii] Or the state policy may produce a result inconsistent with the objective of the federal statute." (Citations omitted.)

Both the district court and the court of appeals found that all three of the *Rice* tests were satisfied. C.L. 14-16,

Supp. App. at 64; App. at 8. This conclusion of federal preemption is correct.

The cornerstone of the statutory scheme involved here is the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1301-1542. The United States is declared "to possess and exercise complete and exclusive national sovereignty in the airspace of the United States." 49 U.S.C. § 1508(a). The Act recognizes and declares to exist "in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." 49 U.S.C. § 1304. The Act then authorizes and directs the Federal Aviation Administrator:

"[T]o develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace." 49 U.S.C. § 1348(a).

This section, termed the "heart" of the Act in Senate Report No. 1811, 85th Cong., 2d Sess. 14-15 (1958), emphasizes the dual purpose of federal regulation over air commerce: (i) "to insure the safety of aircraft," and (ii) to insure "the efficient utilization of such airspace." The legislative history of the Act illuminates the purpose of Congress to "vest in a single Administrator plenary authority for airspace management." S. REP. No. 1811, at 15; *see Id.* at 13-15.

To enable the FAA to fulfill the Act's broad mandate, Congress conferred upon the Administrator wide ranging powers over all aspects of aircraft navigation. For example, the Administrator is authorized to develop plans and formulate policy with respect to the use of navigable airspace and allot the use of such airspace as he deems proper, 49 U.S.C. § 1348(a); prescribe rules

governing the flight of aircraft, including rules for the "efficient utilization of the navigable airspace" as well as "for the protection of persons and property on the ground," 49 U.S.C. § 1348(c); prescribe certain types of equipment aircraft must utilize, 49 U.S.C. § 1423(a)(1); issue airworthiness certificates to aircraft which are in a condition for safe operation, 49 U.S.C. § 1423(c); issue air carrier operating certificates specifying the federal airways over which each carrier is authorized to operate, 49 U.S.C. § 1424(b); and issue airman certificates specifying the capacities in which the holders are authorized to serve, 49 U.S.C. § 1422(a).

An explicit provision relating to the Administrator's responsibilities and authority in the area of aircraft noise was added to the statutory scheme in 1968 by the passage of what is now section 611 of the Act, providing:

"In order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, the Administrator of the Federal Aviation Administration, after consultation with the Secretary of Transportation, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom *and shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom . . .*" 49 U.S.C. § 1431(a).^{*} (Emphasis added.)

^{*} Burbank argues that federal preemption of the field of aircraft noise regulation, which was underscored by the passage of the 1968 amendment, requires a reexamination of this Court's opinion in *Griggs v. Allegheny County*, 389 U.S. 84 (1962). J.S. at 15-16. There is no merit to such a contention. The invalidation of Burbank's attempt to exercise its police power involves altogether different issues than the claimed "taking" without the payment of just compensation involved in *Griggs*. No Fifth Amendment claim is presented by this case. R. 102, 117-18. Nor are the Ninth and Tenth Amendments, which Burbank would belatedly invoke, involved. *Id.*

As the court of appeals held, this amendment "gives the Administrator power to deal with noise that is offensive to persons on the ground, including the noise created by low-flying aircraft, takeoffs and landings, and the noise created by aircraft on the ground at airports." App. at 13.

The legislative history of this 1968 amendment supports the holding of the court below that Burbank could not use its police power in the field of aircraft noise regulation. Senate Report No. 1353, 90th Cong., 2d Sess. at 6-7 (1968) states:

"H.R. 3400 [now 49 U.S.C. § 1431] would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." 2 U.S. CODE CONG. & AD. NEWS 2694 (1968).

Burbank's reliance on comments in the legislative history regarding powers of an airport proprietor is misplaced, as that issue is not before the Court. What is involved in this case is the validity of Burbank's attempted exercise of police power, not the power of a proprietor.*

In exercising his powers, the Administrator of the FAA must take into account a wide range of considerations.

* Although the 1968 Senate Report indicates that an airport could refuse to accept service by larger and noisier aircraft, the scope of the power of an airport proprietor to impose noise restrictions is an unresolved issue involving difficult constitutional, statutory and contractual issues. See *Opinion of the Justices*, — Mass. —, 271 N.E.2d 354, 358-59 (1971). But those issues are not involved in this case because the City of Burbank is not the proprietor of Hollywood-Burbank Airport.

See 49 U.S.C. § 1303. The court of appeals pointed out that these considerations include not only environmental protection but also safety, efficiency, technological progress, and common defense. App. at 10. Congress, the court of appeals emphasized, has given the FAA the responsibility and authority "to resolve the proper balance among the multiple purposes." *Id.*

Pursuant to his statutory authority and responsibility, the Administrator has issued complex and detailed operational rules and regulations controlling the flight of aircraft, 14 C.F.R. Parts 91, 93, 95 and 97, and governing the use of the navigable airspace, 14 C.F.R. Parts 71, 73, 75, and 77. In exercising his noise abatement authority, the Administrator has issued regulations governing aircraft design and performance, 14 C.F.R. Part 36, and has prescribed modified flight procedures. These regulations, as they are applicable to this case, are highlighted in the trial judge's findings. F.F. 34, 35, 38-47, 54-57, Supp. App. at 45-50, 52-53.

Against this background, the court of appeals held that "the pervasiveness of federal regulation in the field of air commerce, the intensity of the national interest in this regulation, and the nature of air commerce itself require the conclusion that State and local regulation in that area has been preempted." App. at 8. To allow local regulation to supplement this comprehensive federal regulation would risk upsetting "the delicate balance struck by the FAA under the aegis of federal law." App. at 10.*

* As it did in each of the lower courts, the State of California has filed an *amicus* brief supporting Burbank. The State's argument is predicated on the unsupported assertion that the curfew serves to implement national environmental policy. Brief at 16-17. However, the trial court found on the basis of uncontradicted evidence that curfew ordinances would actually aggravate, not relieve, the noise problem by causing a bunching of flights in the hours immediately preceding the curfew — the period of greatest annoyance to surrounding communities. This result, said the court, "is totally inconsistent with the objectives of the federal

C. The Conflict Issue.

Even absent federal preemption of an area, a local statute which has the effect of bringing local and federal policies directly into conflict must bow to the supremacy of national enactments. *See, e.g., Perez v. Campbell*, 402 U.S. 637, 649 (1971); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230-31 (1964). The test for the existence of such a "conflict" was stated in *Perez* as follows:

"Three decades ago MR. JUSTICE BLACK, after reviewing the precedents, wrote in a similar vein that, while '[t]his Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, ha[d] made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference[,] . . . [i]n the final analysis, our function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)." 402 U.S. at 649.

Prior to the passage of the Burbank ordinance, the FAA had issued and put into effect an order designed to reduce community exposure to noise in the vicinity of Hollywood-Burbank Airport "to the lowest practicable minimum." This order, BUR 7100.5B, established a preferential runway to be assigned by the Air Traffic Control Tower for all jet departures between 11:00 p.m. and 7:00

statutory and regulatory scheme." F.F. 78, Supp. App. at 59. Moreover, as the court of appeals held, the general commitment of environmental problems to local regulation under section 202(b) of the Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371(b), "does not overcome the preemptive nature of Congress' particular commitment of air commerce problems to the federal domain." App. at 15.

a.m.* The Burbank ordinance was held to be in conflict with this FAA order because it would make the order a nullity and go beyond the noise abatement measures determined by the FAA to constitute "the lowest practicable minimum." The municipal ordinance, said the court, "interferes with the balance set by the FAA among the interests with which it is empowered to deal, and frustrates the full accomplishment of the goals of Congress." App. at 18.

The court of appeals recognized that the local ordinance was in conflict with federal law in another respect as well. Under the Federal Aviation Act, the United States is declared "to possess and exercise complete and exclusive national sovereignty in the airspace of the United States." 49 U.S.C. § 1508(a). The Act declares that "there is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." 49 U.S.C. § 1304. The circuit court held that "the effect of this curfew was to terminate the right of flight of prospective passengers" through a portion of the airspace for one-third of the hours of every day. App. at 18 n.12. This holding is clearly in accord with this Court's recognition that such local prohibition of a federally guaranteed right must fall before the Supremacy Clause. *Sperry v. Florida ex. rel. Florida Bar*, 373 U.S. 379, 385 (1963).

* Appellants' unsupported assertion that the FAA noise abatement runway use order is "non-mandatory" (J.S. at 18) is contradicted by the findings and testimony. The trial court found that pursuant to this order, "the preferential runway is assigned by the FAA control tower [between 11:00 p.m. and 7:00 a.m.] by incorporation into an aircraft's departure clearance as an instruction to the pilot." F.F. 56, Supp. App. at 53. And any person violating an air traffic control clearance or instruction is subject to a civil penalty. See 49 U.S.C. § 1471; 14 C.F.R. § 91.75. The testimony showed that the preferential runway established by the order was used except for a "few occasions" when the control tower permitted deviation because of unusual weather or operating conditions affecting safety. R.T. 390, 387.

An additional ground of conflict was found by the district court to invalidate the ordinance. Basing its ruling upon the holding in *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954) (Supp. App. at 28-29), the court found and concluded that the Burbank ordinance conflicted with the federally certificated rights and obligations of air carriers:

"The Burbank curfew ordinance, by imposing a local veto for a period of hours over the navigable airspace, constitutes a restriction on carriers in fulfilling their statutory duty [to provide adequate service over specified routes, 49 U.S.C. § 1374(a)] and is tantamount to a partial suspension of the Certificates of Public Convenience and Necessity issued to interstate air carriers operating out of Hollywood-Burbank Airport." Supp. App. at 65.

The court of appeals decision does not discuss this ground.

D. The Prior Precedents.

In earlier cases, the lower federal courts have consistently struck down local regulations which have attempted to invade the exclusive federal domain of regulation of aircraft operations and the use of navigable airspace. And when asked, this Court has declined to review these decisions. Moreover, no previous decision of this Court is inconsistent with the ruling of the court of appeals in this case. For these reasons, this appeal does not present an issue worthy of oral argument.

1. *Lower Federal Decisions.* Closely in point is the case of *American Airlines, Inc. v. City of Audubon Park, Kentucky*, 297 F. Supp. 207 (W.D. Ky. 1968). There the defendant city's ordinance prohibited overflights below 750 feet. Planes landing at and taking off from the Louisville, Kentucky airport, in accordance with FAA procedures, flew at heights below this level. The trial

court found the ordinance to conflict with the Federal Aviation Act and regulations promulgated thereunder, and to operate in an area preempted by Congress. *Id.* at 212. The court of appeals, in a *per curiam*, affirmed the district court on all grounds. 407 F.2d 1306 (6th Cir. 1969). *Certiorari* was denied. 396 U.S. 845 (1969).

American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967), involved an ordinance of the Town of Hempstead prohibiting noises within the town of over a specified level and duration. Hempstead is situated near John F. Kennedy International Airport. Jet aircraft taking off from and landing at this airport produced noises beyond the permissible levels set by the ordinance. The district court found that the ordinance operated to forbid noise only by forbidding flight, and, as such, operated in a preempted area. *Id.* at 230-31. "The federal regulation of air navigation and air traffic is so complete that it leaves no room for such local legislation as the Hempstead Ordinance." *Id.* at 233.

The district court also found that the ordinance was in conflict with the federal action in the area. After citing direct conflicts between FAA landing and takeoff procedures and the requirements of the ordinance, the court stated:

"The conflict, however, is also subtler. Local initiative in noise control of aviation is inherently an effort to regulate a consequence while disclaiming regulation of the cause. It cannot coexist with a comprehensive system of federal regulation of aircraft manufacture (through certificates of airworthiness) and federal regulation of air navigation and air traffic." *Id.* at 235.

On appeal, the decision of the district court was affirmed on conflict grounds. 398 F.2d 369 (2d Cir. 1968). This Court denied *certiorari*. 393 U.S. 1017 (1969).

United States v. City of New Haven, 447 F.2d 972 (2d Cir. 1971), involved a dispute between the Town of East Haven and the City of New Haven as airport operator over acquisition by New Haven of land for use as a "clear zone" at the end of an extended runway. The runway had been extended pursuant to federal grant agreements between the airport and the FAA to facilitate the use of jet aircraft. Although the runway extension was within the City of New Haven, the City purchased 73 acres in East Haven for use as a "clear zone." The Connecticut Supreme Court ruled that New Haven had not obtained the land in East Haven in accordance with Connecticut law. It ordered New Haven to cease operating the runway at its extended length and thereby using the "clear zone" it had improperly acquired.

The United States obtained a preliminary injunction in the federal district court restraining the enforcement of the state court order and directing that East Haven move the Connecticut court for dissolution of its order. The court of appeals upheld the federal court injunction on the basis of the supremacy of federal control over use of the navigable airspace. The court said:

"Under the Federal Aviation Act of 1958 (49 U.S.C. § 1301 et seq. as amended) the United States has asserted that it possesses and exercises 'complete and exclusive national sovereignty in the airspace of the United States.' 49 U.S.C. § 1508(a). . . . State legislation purporting to deny access to navigable air space would therefore constitute a forbidden exertion of the power which the federal government has asserted." 477 F.2d at 973.

In *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 132 F. Supp. 871 (E.D.N.Y. 1955), the district court held that the comprehensive scheme of the 1938 Civil Aeronautics Act, the predecessor of the Federal Aviation Act of 1958, and the regulations adopted pursuant thereto,

"have regulated air traffic in the navigable airspace in the interest of safety to such an extent as to constitute preemption in that field. . . ." 132 F. Supp. at 881. As a consequence, the court struck down an ordinance, enacted by a town adjacent to New York's Idlewild Field, prohibiting flights over the town at an altitude of less than 1000 feet. The court of appeals affirmed. 288 F.2d 812 (2d Cir. 1956).

Thus for some 17 years the district courts and courts of appeals have uniformly struck down local ordinances attempting to regulate aircraft operations or use of navigable airspace and, when asked, this Court has declined to review those decisions.

2. *State Court Decisions.* In the recent decision in *Opinion of the Justices*, — Mass. —, 271 N.E.2d 354 (1971), the highest court in Massachusetts held invalid proposed legislation which would prevent nonconforming supersonic airplanes from landing or taking off anywhere in Massachusetts if the noise they emitted exceeded a specified level. The justices found the proposed law, which was based upon police power and not proprietary power, invalid under the Supremacy Clause.

"[T]he principles expressed in that [*Hempstead*] case and the comprehensive character of the Federal air statutes and regulations, existing even prior to 1968, lead us to conclude that the proposed Massachusetts legislation would intrude upon an area preempted by the Congress." 271 N.E.2d at 358.

The lower state court cases of *Stagg v. Municipal Court*, 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (1969), J.S. at 11, and *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 A.2d 692 (1969), J.S. at 11 n. 14, cited by Burbank, are inapposite.

Stagg involved a curfew regulation adopted by the proprietor of the Santa Monica Municipal Airport,

which serves no scheduled commercial air traffic. Therefore, that case is not analogous to the attempt of Burbank to regulate with its police power an airport which it neither owns nor operates and where there are scheduled interstate and intrastate operations.* Moreover, the *Stagg* decision was rendered without any consideration of the important 1968 Amendment to the Federal Aviation Act, 49 U.S.C. § 1431, the accompanying legislative history, or any of the recent noise control measures taken by the FAA.

The case of *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 A.2d 692 (1969) (cited in J.S. at 11 n.14), appears also to have been decided without considering the 1968 Amendment to the Act and the accompanying regulatory developments. In that case the trial court was asked to enjoin a planned expansion of a small, noncommercial airport and certain operational features of that airport. It did issue an "experimental" injunctive order requiring a jet curfew, after finding no preemption by the federal government, at least where no scheduled, certificated carriers were involved. 261

* As it did in the court of appeals, Burbank has attempted to supplement the record in this case by appending and relying upon the FAA's response to the *Petition of Jordan A. Dreifus*. That petition, which was turned down by the FAA, requested the federal government to impose a night curfew at the Santa Monica Airport. In its *amicus* brief to the Ninth Circuit, the FAA pointed out the distinctions between the Santa Monica and Hollywood-Burbank situations and stated:

"It is important to bear in mind that the *Dreifus* opinion stemmed from a request for Federal regulatory action of a type which the FAA considered as not being appropriate. (Appendix to Brief of Appellants at 12.) The FAA in the *Dreifus* opinion did not endorse the Santa Monica type curfew ordinance or intend by its action to encourage a multiplication of such restrictions on airport use by state and local governments, whether or not they acted as proprietors. . . . The FAA filed its brief *amicus curiae* in this case because it realizes that the proliferation of this type of local ordinance would stagnate and destroy the national air transportation system." FAA Brief at 25.

A.2d at 701. However, the trial court's order is presently on appeal within the state court system. And on July 17, 1972 the United States filed an action in the federal court in New Jersey to compel the dissolution of the state court-imposed curfew. *United States v. Town of Morristown*, Civil No. 1214-72, D.N.J.*

3. *The Supreme Court Precedents.* The decisions of this Court referred to by Burbank are not inconsistent with the decision below. The case of *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (cited in J.S. at 16) is inapposite on the preemption point for the reasons set forth in the opinion of the court of appeals. App. at 10-11.

Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963) (cited in J.S. at 17), is also inapplicable. There the Court held that the Federal Aviation Act does not express an intention to preempt state anti-discrimination legislation. Assuming that the Civil Aeronautics Board had power to bar racial discrimination with respect to customers and employees, the Court found that the enforcement of a Colorado statute to bar racial discrimination in hiring by air carriers did not frustrate the purpose of the federal legislation "at least so long as any power the Civil Aeronautics Board may have remains 'dormant and unexercised'" 372 U.S. at 724 (footnote omitted). The Court noted that a different situation would be presented "if the federal authorities seek to deal with discrimina-

* In *Loma Portal Civic Club v. American Airlines, Inc.*, 61 Cal.2d 582, 39 Cal. Rptr. 708 (1964), cited by Burbank, J.S. at 14, 16, plaintiffs failed in their efforts to enjoin certain commercial jet flight operations. Although the court declined to find federal preemption of "all aspects" of air transportation (61 Cal. 2d at 591-92, 39 Cal. Rptr. at 714), the decision preceded the important 1968 amendment to the Federal Aviation Act, 49 U.S.C. § 1431, and the subsequent FAA noise control regulations. A similar request for injunctive relief was denied in *Virginians for Dulles v. Volpe*, 4 E.R.C. 1232 (E.D. Va. May 26, 1972).

tion in hiring practices and their power to do so is upheld." *Id.* at 724 n.22. In the instant case the FAA clearly has the power to act in the area in question, and has done so.

Equally inapposite are cases such as *Braniff Airways v. Nebraska State Board*, 347 U.S. 590 (1954) (cited in J.S. at 17), where the Court found that state power to tax aircraft had not been preempted by the predecessor of the Federal Aviation Act of 1958. The court below did not find that the federal government has preempted every conceivable aspect of aviation. The preemption in question relates to the fields of the regulation of aircraft operations, the use of navigable airspace, and aircraft noise incident to air commerce. It is the attempted invasion of those specific areas which invalidated the Burbank ordinance.*

Head v. New Mexico Board, 374 U.S. 424 (1963) (cited in J.S. at 17), simply held that the nature of the regulatory power given the FCC was not sufficient to indicate a congressional intention to preempt all the detailed state regulation of professional advertising practices, "particularly when the grant of power to the Commission was accompanied by no substantive standard other than the 'public interest, convenience, and necessity.'" 374 U.S. at 431. That case is in no way analogous to the present situation where the FAA, in response to a specific congressional mandate, has adopted comprehensive regulations governing aircraft operations, the use of the navigable airspace and aircraft noise.

* Similarly, the preemption holding of the court below is not inconsistent with this Court's ruling in *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 40 U.S.L.W. 4391 (U.S. April 19, 1972), that the federal statutes do not evidence a congressional purpose to preempt state power to levy charges designed to help defray the costs of airport construction and maintenance. *Id.* at 4395. The preemption here relied upon does not extend to that fiscal area.

Rice v. Chicago Board of Trade, 331 U.S. 247 (1947) (cited in J.S. at 18), was a companion case to *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 218, which was relied upon by the court below as setting forth the standards by which preemption is to be determined. *Board of Trade* considered the preemption aspects of a different statute, and the Court merely determined that the Commodity Exchange Act, unlike the United States Warehouse Act considered in *Santa Fe Elevator*, did not evidence a congressional intent to make its regulatory features exclusive in the area. This decision is completely in accord with the ruling below.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be summarily affirmed.

Respectfully submitted,
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IN THE
Supreme Court of the United States

October Term, 1972
No. 71-1637

THE CITY OF BURBANK, etc., *et al.*,

Appellants,

VS.

LOCKHEED AIR TERMINAL, INC., *et al.*,

Appellees.

On Appeal From the United States Court of Appeals
for the Ninth Circuit

Motion for Leave to File Supplemental Brief
Amicus Curiae

The State of California respectfully asks leave of the Court to file this supplemental brief *Amicus Curiae* in this cause on behalf of appellants, *City of Burbank, et al.*

Respectfully submitted,

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IN THE
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THE CITY OF BURBANK, etc., et al.,

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On Appeal From the United States Court of Appeals
for the Ninth Circuit

**Supplemental Brief of the State of California
Amicus Curiae in Support of Appellants
Interest of the Amicus**

The interest of the amicus is as set out in our brief
amicus curiae filed with this Court in July, 1972.

Summary of Supplemental Argument

The Congress by its enactment in October, 1972, of
the Noise Control Act of 1972 has reinforced the con-
tention of Appellants that the Federal Government
has not preempted the entire field of airport noise re-
duction.

ARGUMENT

I. **Introduction**

At the time Appellants filed their jurisdictional statement the State of California filed an amicus brief with this Court in support thereof. That brief was addressed to both the importance of the case and the merits. We ask that it be considered by the Court as our brief on the merits. This supplemental brief has only one purpose, to discuss the applicability of the subsequently enacted Noise Control Act of 1972, Public Law 92-574.

II.

Congress by Its Enactment of the Noise Control Act of 1972 Has Reinforced the Contention of Appellants That the Federal Government Has Not Preempted the Entire Field of Airport Noise Reduction

A. Congress by Enactment of the Noise Control Act Has Preempted (in Part) Product Noise, Railroad Noise, and Motor Carrier Noise, But Not Aircraft Noise

The President has just signed the Noise Control Act of 1972 (hereinafter NCA) into law. Pub. Law 92-574. (It is reproduced at 118 Cong. Rec. §§ 10295-10300 (daily ed. Oct. 18, 1972).) While it is a comprehensive noise control statute, we shall deal solely with the provisions pertinent to this case.

Congress found that "inadequately controlled noise presents a growing danger to the health and welfare of the Nation's population, . . ." NCA § 2(a)(1). It further found that the major sources include transportation vehicles and equipment. NCA § 2(a)(2). The Congress declared that it is "the policy of the United States to promote an environment for all Americans free

from noise that jeopardizes their health or welfare." NCA § 2(b). The Congress next found that while primary responsibility for control of noise rests with State and local governments, Federal action is essential to deal with major noise sources in commerce, control of which requires national uniformity of treatment. NCA § 2 (a)(3).

The Noise Control Act then proceeds to discuss noise limitations upon four categories of objects, as to three of which there exist partially preemptive provisions:

(1) "Products" (NCA § 3(3)—a category not including aircraft or its components). Regarding preemption—see NCA § 6(e).

(2) "Railroads" (NCA § 17). Regarding preemption—see NCA § 17(c).

(3) "Motor Carriers" (NCA § 18). Regarding preemption—see NCA § 18(c).

(4) "Aircraft" (NCA § 7). There is *no* provision for preemption.

We shall discuss these one by one.

(1) *Products*

The term "product" is defined as meaning any manufactured article or goods or component thereof excluding any aircraft, aircraft engine, propeller, or appliance, certain military equipment, certain rockets or equipment designed for NASA, and certain experimental machinery. NCA § 3(3). The Administrator of the Environmental Protection Agency shall publish information on the levels of noise requisite to protect the public health and welfare with an adequate margin of safety. NCA § 5(a)(2). He shall then identify the products or class of products which are the major sources of

noise. NCA § 5(b)(1). Thereafter he shall propose and prescribe regulations covering certain "products." NCA § 6(a), (b), and (c).

The following provision was adopted with respect to preemption:

"(e)(1) No State or political subdivision thereof may adopt or enforce—

(A) with respect to any new product for which a regulation has been prescribed by the Administrator under this section, any law or regulation which sets a limit on noise emissions from such new product and which is not identical to such regulation of the Administrator; or

(B) with respect to any component incorporated into such new product by the manufacturer of such product, any law or regulation setting a limit on noise emissions from such component when so incorporated.

(2) Subject to sections 17 and 18, nothing in this section precludes or denies the right of any State or political subdivision thereof to establish and enforce controls on environmental noise (or one or more sources thereof) through the licensing, regulation, or restriction of the use, operation, or movement of any product or combination of products." NCA § 6(e).

(2) *Railroads*

The Administrator of the Environmental Protection Agency is charged with proposing and promulgating noise emission regulations for railroads. NCA § 17(a). The Secretary of Transportation is to promulgate regulations to insure compliance with the Administrator's standards. NCA § 17(b).

The following provision was adopted with respect to preemption:

"(c)(1) Subject to paragraph (2) but notwithstanding any other provisions of this Act, after the effective date of a regulation under this section applicable to noise emissions resulting from the operation of any equipment or facility of a surface carrier engaged in interstate commerce by railroad, no State or political subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

"(2) Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control, license, regulate, or restrict the use, operation, or movement of any product if the Administrator, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation, or restrict [sic.] is necessitated by special local conditions and is not in conflict with regulations promulgated under this section." NCA § 17(c).

(3) *Motor Carriers*

The Administrator of the Environmental Protection Agency is charged with proposing and promulgating noise emission regulations for motor carriers engaged in interstate commerce. NCA § 18(a). The Secretary of

Transportation is to promulgate regulations to insure compliance with the Administrator's standards. NCA § 18(b).

The following provision was adopted with respect to preemption:

"(c)(1) Subject to paragraph (2) of this subsection but notwithstanding any other provision of this Act, after the effective date of a regulation under this section applicable to noise emissions resulting from the operation of any motor carrier engaged in interstate commerce, no State or political subdivision thereof may adopt or enforce any standard applicable to the same operation of such motor carrier, unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

"(2) Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control, license, regulate, or restrict the use, operation, or movement of any product if the Administrator, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation, or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under this section." NCA § 18(c).

(4) *Aircraft*

The Administrator of the Environmental Protection Agency shall conduct a "study" of the:

"(1) adequacy of Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission standards on new and existing aircraft, together with recommendations on the retrofitting and phaseout of existing aircraft;

(3) implications of identifying and achieving levels of cumulative noise exposure around airports; and

(4) additional measures available to airport operators and local governments to control aircraft noise." NCA § 7(a).

He shall report on such study to designated Congressional committees. *Ibid.*

The Federal Aviation Act's section 611 (49 U.S.C. § 1431) adopted in 1968 is amended. NCA § 7(b).¹

¹Section 611 of the Federal Aviation Act (49 U.S.C. § 1431) as it was enacted in 1968 and before it was amended by the Noise Control Act read as follows:

"§ 1431. *Control and abatement of aircraft noise and sonic boom—Consultations; standards; rules and regulations*

"(a) In order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, the Administrator of the Federal Aviation Administration, after consultation with the Secretary of Transportation, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of

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The Federal Aviation Administration's authority to prescribe standards for the measurement, control and abatement of aircraft noise is retained. *Ibid.* The following pertinent changes have been made in section 611.

such standards, rules, and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this subchapter.

"Considerations determinative of standards, rules, and regulations"

"(b) In prescribing and amending standards, rules and regulations under this section, the Administrator shall—

"(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this chapter and chapter 23 of this title;

"(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

"(3) consider whether any proposed standard, rule, or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

"(4) consider whether any proposed standard, rule, or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

"(5) consider the extent to which such standard, rule, or regulation will contribute to carrying out the purposes of this section.

"Amendment, modification, suspension, or revocation of certificate; notice and appeal rights"

"(c) In any action to amend, modify, suspend, or revoke a certificate in which violation of aircraft noise or sonic boom standards, rules, or regulations is at issue, the certificate holder shall have the same notice and appeal rights as are contained in section 1429 of this title, and in any appeal to the National Transportation Safety Board, the Board may amend, modify, or reverse the order of the Administrator if it finds that control or abatement of aircraft noise or sonic boom and the public interest do not require the affirmation of such order, or that such order is not consistent with safety in air commerce or air transportation."

Section 611 of the Federal Aviation Act as it has been amended by the Noise Control Act reads as follows:

The Federal Aviation Administration (FAA) retains such jurisdiction as it has to control and abate aircraft noise and sonic boom. FAA must now consult with the Environmental Protection Administration (EPA). The responsibility of FAA with regard to type

"Control and Abatement of Aircraft Noise and Sonic Boom

"Sec. 611. (a) For purposes of this section:

"(1) The term 'FAA' means Administrator of the Federal Aviation Administration.

"(2) The term 'EPA' means the Administrator of the Environmental Protection Agency.

"(b)(1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, and modification, suspension, or revocation of any certificate authorized by this title. No exemption with respect to any standard or regulation under this section may be granted under any provision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted.

"(2) The FAA shall not issue an original type certificate under section 603(a) of this Act for any aircraft for which substantial noise abatement can be achieved by prescribing standards and regulations in accordance with this section, unless he shall have prescribed standards and regulations in accordance with this section which apply to such aircraft and which protect the public from aircraft noise and sonic boom, consistent with the considerations listed in subsection (d).

"(c)(1) Not earlier than the date of submission of the report required by section 7(a) of the Noise Control Act of 1972, EPA shall submit to the FAA proposed regulations to provide such control and abatement of aircraft noise and sonic boom (including control and abatement through the exercise of any of the FAA's regulatory authority over air commerce or transportation or over aircraft or airport operations) as EPA determines is necessary to pro-

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certification and noise is emphasized. EPA is now to propose regulations to FAA. FAA is to consider such proposals and decide whether or not to adopt them. EPA can request FAA to reexamine FAA's findings. The five considerations which FAA is to take into ac-

count protect the public health and welfare. The FAA shall consider such proposed regulations submitted by EPA under this paragraph and shall, within thirty days of the date of its submission to the FAA, publish the proposed regulations in a notice of proposed rulemaking. Within sixty days after such publication, the FAA shall commence a hearing at which interested persons shall be afforded an opportunity for oral (as well as written) presentations of data, views, and arguments. Within a reasonable time after the conclusion of such hearing and after consultation with EPA, the FAA shall—

“(A) in accordance with subsection (b), prescribe regulations (i) substantially as they were submitted by EPA, or (ii) which are a modification of the proposed regulations submitted by EPA, or

“(B) publish in the Federal Register a notice that it is not prescribing any regulation in response to EPA's submission of proposed regulations, together with a detailed explanation providing reasons for the decision not to prescribe such regulations.

“(2) If EPA has reason to believe that the FAA's action with respect to a regulation proposed by EPA under paragraph (1)(A)(ii) or (1)(B) of this subsection does not protect the public health and welfare from aircraft noise or sonic boom, consistent with the considerations listed in subsection (d) of this section, EPA shall consult with the FAA and may request the FAA to review, and report to EPA on, the advisability of prescribing the regulation originally proposed by EPA. Any such request shall be published in the Federal Register and shall include a detailed statement of the information on which it is based. The FAA shall complete the review requested and shall report to EPA within such time as EPA specifies in the request, but such time specified may not be less than ninety days from the date the request was made. The FAA's report shall be accompanied by a detailed statement of the FAA's findings and the reasons for the FAA's conclusions; shall identify any statement filed pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 with respect to such action of the FAA under paragraph (1) of this subsection; and shall specify whether (and where) such statements are available for public inspection. The FAA's report shall be

count remain essentially the same. Existing regulations continue in effect until modified. (118 Cong. Rec. 10296-10297 (daily ed. Oct. 18, 1972); compare with previously codified 49 U.S.C. § 1431.) In brief, as far as actual power is concerned, FAA retains essentially

published in the Federal Register, except in a case in which EPA's request proposed specific action to be taken by the FAA, and the FAA's report indicates such action will be taken.

"(3) If, in the case of a matter described in paragraph (2) of this subsection with respect to which no statement is required to be filed under such section 102(2)(C), the report of the FAA indicates that the proposed regulation originally submitted by EPA should not be made, then EPA may request the FAA to file a supplemental report, which shall be published in the Federal Register within such a period as EPA may specify (but such time specified shall not be less than ninety days from the date the request was made), and which shall contain a comparison of (A) the environmental effects (including those which cannot be avoided) of the action actually taken by the FAA in response to EPA's proposed regulations, and (B) EPA's proposed regulations.

"(d) In prescribing and amending standards and regulations under this section, the FAA shall—

"(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this Act and the Department of Transportation Act;

"(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

"(3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

"(4) consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

"(5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section.

"(e) In any action to amend, modify, suspend, or revoke a certificate in which violation of aircraft noise or sonic boom standards or regulations is at issue, the certifi-

(This footnote is continued on next page)

the same authority with the same considerations that it had before the enactment of the Noise Control Act. EPA is given only a studying and proposing role.

B. Congress, by Deleting the Aircraft Noise Preemption Provision in the Senate Bill, Consciously Determined Not to Preempt the Field of Aircraft Noise

The legislative history of the enactment of the Noise Control Act of 1972 shows a conscious Congressional decision to delete aircraft noise preemption provisions. (118 Cong. Rec. H 1508-H1539 (daily ed. Feb. 29, 1972); 118 Cong. Rec. S 17743-17764, 17774-17785 (daily ed. Oct. 12, 1972); 118 Cong. Rec. S 17988-18014 (daily ed. Oct. 13, 1972); 118 Cong. Rec. H 10261-10263, 10287-10301, S. 18638-18646 (Oct. 18, 1972).)

In brief, the bill which passed the Senate contained a provision specifically preempting the field of aircraft noise regulation. The bill which passed the House con-

...kate holder shall have the same notice and appeal rights as are contained in section 609, and in any appeal to the National Transportation Safety Board, the Board may amend, modify, or reverse the order of the FAA if it finds that control of abatement of aircraft noise or sonic boom and the public health and welfare do not require the affirmation of such order, or that such order is not consistent with safety in air commerce or air transportation.

"(c) All—

"(1) standards, rules, and regulations prescribed under section 611 of the Federal Aviation Act of 1958, and

"(2) exemptions, granted under any provision of the Federal Aviation Act of 1958, with respect to such standards, rules, and regulations, which are in effect on the date of the enactment of this Act, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Administrator of the Federal Aviation Administration in the exercise of any authority vested in him, by a court of competent jurisdiction, or by operation of law."

(118 Cong. Rec. H10296-10297 (daily ed. Oct. 18, 1972))

tained no such provision. The bill as enacted by Congress deleted the preemption provision.

To discuss the matter in greater detail, the bill which passed the Senate provided for preemption. (118 Cong. Rec. S. 18013 (daily ed. Oct. 13, 1972)—§ 505; see 118 Cong. Rec. S 17989 (daily ed. Oct. 13, 1972) (remarks of the Senator carrying the bill, Senator Tunney); also see 118 Cong. Rec. S. 17749, 17753 (daily ed. Oct. 12, 1972)—§ 506.) The bill as it passed the Senate contained the following provision:

"Sec. 505. No State or political subdivision thereof may adopt or enforce any standard respecting noise emissions from any aircraft or engine thereof." (118 Cong. Rec. S 18013 (daily ed. Oct. 13, 1972).)

The bill which passed the House contained no such provision. (118 Cong. Rec. H 1523-1527 (daily ed. Feb. 29, 1972).) After conference the bill adopted by the Congress did not contain the Senate's provision preempting the field of aircraft noise reduction. (118 Cong. Rec. H 10295-10300 (daily ed. Oct. 18, 1972).) While the final bill as it relates to aircraft noise borrows some provisions from the Senate bill (greater authority to Environmental Protection Agency; study of aircraft noise by Environmental Protection Agency) and some from the House bill (ultimate authority in Federal Aviation Administration) the decision to omit the preemption of aircraft noise is conspicuous. Congress has made its conscious decision.²

²There appears to be no report of the conference committee. The report of the House committee on the bill in the form it originally passed the House stated that no provision of the bill

(This footnote is continued on next page)

C. Congress Has Directed Federal Agencies to (1) Act in Such a Manner as to Further the National Noise Reduction Policy and (2) to Comply With State and Local Noise Requirements

Congress has authorized and directed that Federal agencies shall to the fullest extent consistent with their authority carry out the programs within their control in such a manner as to further the national noise reduction policy. NCA § 4(a). That policy is to promote an environment for all Americans "free from noise that jeopardizes their health or welfare." NCA § 2(b).

Next, each department, agency, or instrumentality of the executive, legislative, and judicial branches of the federal government having jurisdiction over any property or facility or engaged in any activity resulting, or which may result, in the emission of noise "shall comply" with State and local requirements respecting control and abatement of environmental noise to the same extent that any person is subject to such requirements. NCA § 4(a) and (b). (The President may make specific exemptions. NCA § 4(b).)

was intended to alter in any way the relationship between Federal and State and local authority that existed with respect to section 611 of the Federal Aviation Act prior to enactment of the bill. (H.R. Rep. No. 92-842, 92d Cong., 2d Sess. 10 (1972).) The Senate bill as stated in the text explicitly provided for preemption. The Senate committee report stated that States and local governments were preempted from establishing or enforcing noise emission standards unless identical to federal ones, that the bill did not address the responsibilities or powers of airport operators, and that the existing relationships between the various levels of government under section 611 were not affected. (S. Rep. No. 92-1160, 92d Cong. 2d Sess. 10-11 (1972).) As stated above, we are aware of no report on the bill as it emerged from conference and was enacted.

In brief, it is the responsibility of every Federal agency (which includes the Federal Aviation Administration) to the "fullest extent consistent with their authority" to carry out a program of promoting an environment free from noise which jeopardizes the health and welfare of all Americans. (See NCA §§ 4(a), 2(b).) A noise shift rule adopted by an FAA tower chief which appears to have the effect of diverting noise to other populated areas while invalidating Burbank's noise limitation ordinance flatly contradicts the Congressional mandate. (See discussion in the Amicus Brief of the Attorney General of the State of California, pp. 18-20.)

Next, every federal agency (defined to include both executive and judicial branches) having jurisdiction over any property or facility or engaged in any activity resulting or which may result in the emission of noise shall comply with state and local requirements respecting the control and abatement of environmental noise. NCA § 4(b).

(1) First, to the extent that the FAA has jurisdiction over Hollywood-Burbank, it shall comply with the Burbank ordinance. This clearly means that the tower chief shall comply with the curfew.

(2) Second, to the extent that the FAA's regulatory activity may result in the emission of noise (i.e., by enabling noise at night otherwise prohibited), such activity by the FAA violates the command of Congress.

(3) Third, to the extent that Courts of the United States have jurisdiction by virtue of their

implementing the laws of the United States in regard to Hollywood-Burbank airport, they too must adhere to the Congressional mandate to comply with state and local requirements.

(4) Fourth, to the extent that the Courts by their decision-making are engaged in activity which may result in the emission of noise (i.e., by invalidating a noise control ordinance, thus permitting noise at night), they again must adhere to the Congressional command to comply with state and local requirements.

Conclusion

Congress has now spoken on the subject of noise. It spoke with respect to four categories of noise sources: (1) products, (2) railroads, (3) motor carriers, and (4) aircraft. Congress preempted (in part) with respect to the first three. Congress did not preempt with respect to aircraft.

The Senate proposed preemption of the field of aircraft noise. Congress as a whole deleted the Senate provision. The Congressional intent is not to preempt the field of aircraft noise.

Congress declared a policy of noise reduction. All federal agencies are mandated to adhere to that policy. All branches of government, including the executive and the judicial, having jurisdiction over any property or facility or engaged in activity which may result in the emission of noise shall comply with State and local noise abatement requirements.

Congress has now spoken. It did not preempt the Burbank ordinance. Quite to the contrary, it required federal agencies to abide by it.

Respectfully submitted,

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IN THE
Supreme Court of the United States

October Term, 1972

No. 71-1637

THE CITY OF BURBANK, a municipal corporation; DR. JARVEY GILBERT, Mayor; ROBERT R. MCKENZIE, Vice Mayor; Councilman GEORGE W. HAVEN; Councilman ROBERT A. SWANSON; Councilman D. VERNER GIBSON; JOSEPH N. BAKER, City Manager; SAMUEL GORLICK, City Attorney for the City of Burbank and REX R. ANDREWS, Chief of Police of the City of Burbank,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., a corporation, PACIFIC SOUTHWEST AIR LINES, a corporation, and AIR TRANSPORT ASSOCIATION OF AMERICA,

Appellees.

On Appeal From the United States Court of Appeals
for the Ninth Circuit.

BRIEF OF THE APPELLANTS.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 457 F. 2d 667 and is included in the Appendix (A. 410). The opinion of the United States District Court for the Central District of California is reported in 318 F. Supp. 914 and is included in the Appendix (A. 341).

JURISDICTION.

The judgment of the United States Court of Appeals was entered on March 22, 1972 (A. 5, 428). Notice of Appeal to this Court was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit on May 15, 1972 (A. 5). The Jurisdictional Statement was filed with the Clerk of this Court on June 17, 1972. This Court noted probable jurisdiction on October 10, 1972. Since this is an appeal from a judgment of the United States Court of Appeals which held invalid an ordinance of the City of Burbank, as repugnant to the Supremacy Clause of the Constitution of the United States (Art. VI, Clause 2), the jurisdiction of this Court rests on 28 U.S.C. §1254(2). The following decisions sustain the jurisdiction of this Court to review the judgment in this case on appeal: *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134, 135 (1962); *City of Detroit v. Murray Corporation of America*, 355 U.S. 489, 492 (1958); *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 70 (1954); *Dutton v. Evans*, 400 U.S. 74, 77 (1970).

ORDINANCE INVOLVED.

The ordinance involved in this case is Ordinance No. 2216 of the City of Burbank passed and adopted on March 31, 1970, which added Section 20-32.1 to the Burbank Municipal Code providing as follows (A. 378):

"Sec. 20-32.1. Aircraft Take-Offs.

"(a) Pure Jets Prohibited from Taking Off
Between 11:00 P.M. and 7:00 A.M.

"It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(b) Airport Operator Prohibited from Allowing Take-Offs.

"It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(c) Exception: Emergencies.

"This Section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off."

CONSTITUTIONAL PROVISIONS INVOLVED.

The provisions of the Constitution of the United States involved in this case are as follows:

(1) The Supremacy Clause (Art. VI, Clause 2) which provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

(2) The Commerce Clause (Art. I, Section 8, Clause 3), which provides:

["The Congress shall have power . . ."]

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

(3) That portion of the Fifth Amendment which provides:

" . . . nor shall [any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(4) The Ninth Amendment which provides:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

(5) The Tenth Amendment which provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

QUESTIONS PRESENTED.

The questions presented for review are as follows (A. 55, 342):

(1) Whether the Federal government has so preempted the fields of regulation of the use of air space and the regulation of air traffic so as to invalidate and preclude enforcement of the ordinance (Supremacy Clause, Article VI, Clause 2).

(2) Whether the ordinance is in conflict with Federal statutes or Federal regulations and is rendered void and unenforceable by the Supremacy Clause (Article VI, Clause 2).

(3) Whether enforcement of the ordinance would result in an intolerable and unreasonable burden on interstate commerce in violation of the Commerce Clause (Article I, Section 8, Clause 3).

(4) Whether the ordinance constitutes an attempted regulation of a phase of the national commerce which, because of the need of national uniformity, demands that regulation, if any, be prescribed by a single authority.

In the terms and circumstances of the case the question presented for review is whether the City of Burbank is powerless to restrict departures of pure jet aircraft from Hollywood-Burbank Airport, a *privately* owned and operated airport within its boundaries, between the hours of 11:00 p.m. and 7:00 a.m. under the following circumstances:

(a) To accommodate jet aircraft the private airport proprietor (Lockheed Air Terminal, Inc.) has extended the airport runways to the maximum limits of its property so that aircraft using it must necessarily fly at low altitudes over adjacent residences, with resultant disturbance of the occupants of such residences, particularly during the hours normally devoted to sleep [Pl. Ex. 2, A. 428-429, 98; Pl. Ex. 7, A. 452-453, 103; Pl. Ex. 30, A. 453, 113].

(b) The Federal Aviation Administrator has refused to make any determinations as to what would be acceptable noise levels in terms of jet aircraft for particular airport environments and has left such deter-

minations in the hands of individual airport proprietors.¹

(c) Airport proprietors, without violating any Federal statute or regulation, may exclude any aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.²

(d) The FAA Chief of the Airport Traffic Control Tower at the Hollywood-Burbank Airport has recognized the seriousness of the noise problem in the vicinity of the airport and the steps taken by him to reduce this problem were ineffective (A. 317, 319).

(e) The Federal Aviation Administrator, under similar circumstances, has declared that nondiscriminatory time limitations may be an effective and appropriate means of adapting aircraft noise to the needs of local communities and that such form of locally responsive noise control is clearly in the national interest.³

(f) The only regularly scheduled flight affected by the ordinance was in intrastate flight of an intrastate air carrier (Pacific Southwest Air Lines) departing at 11:30 p.m. each Sunday (A. 394). The other flights affected were principally departures of corporate jet aircraft (A. 395).

¹34 Federal Register 18355-18356, Nov. 18, 1969; now 14 C.F.R. §36.5. The pertinent portion is set out in the Appendix to this Brief at p. 3.

²Letter dated June 22, 1968 from the Secretary of Transportation to the Committee on Interstate Commerce contained in Senate Report No. 1353, 90th Cong. 2d Sess. 6-7 (1968). The letter is set out in full in the Appendix to this Brief at pp. 1-2. See also 34 Federal Register 18355-18356, footnote 1, *supra*; *In re Drefus* (Appendix to this Brief at p. 11).

³*In re Drefus*, FAA Regulatory Docket No. 9071 (7/10/69). The full text of the Federal Aviation Administrator's Opinion in this matter is set out in the Appendix to this Brief at pp. 4-13.

STATEMENT OF THE CASE.

1. Nature of the Case.

This is a suit brought by Lockheed Air Terminal, Inc.⁴ (hereinafter referred to as "Lockheed"), a Delaware corporation, as owner and operator of the Hollywood-Burbank Airport, and by Pacific Southwest Air Lines (hereinafter referred to as "PSA"), an intra-state air carrier⁵ incorporated under the laws of the State of California, against the City of Burbank (hereinafter referred to as "Burbank") and certain of its officers, seeking declaratory and injunctive relief with respect to the ordinance referred to above (A. 6-8) and alleging that the ordinance violated the Due Process Clause (XIV Amendment), the Commerce Clause (Art. I, Sec. 8, Clause 3), the War Powers Clauses (Art. I, Sec. 8, Clauses 11-14) and the Supremacy Clause (Art. VI, Clause 2) of the Constitution of the United States (A. 15). The District Court's jurisdiction was invoked under 28 U.S.C. §1331 and 28 U.S.C. §1337 (A. 7).

Air Transport Association of America (hereinafter referred to as "ATA"), an unincorporated trade association of scheduled interstate air carriers,⁶ was subsequently permitted to file a complaint in intervention seeking the same relief but only alleging that the ordinance violated the Commerce Clause (Art. I, Sec. 8,

⁴All of the stock of Lockheed Air Terminal, Inc. is owned by Lockheed Aircraft Corporation (A. 99,438).

⁵As an intrastate air carrier, PSA is not subject to regulation or control by the Civil Aeronautics Board. Its fares and charges are regulated by the California Public Utilities Commission (Sec. 751, California Public Utilities Code) and it holds a Certificate of Public Convenience and Necessity issued by that Commission (A. 383).

⁶The members of ATA include virtually all United States scheduled interstate air carriers (A. 376).

Clause 3), and the Supremacy Clause (Art. VI, Clause 2) of the United States Constitution (A. 27, 34).

Lockheed and PSA subsequently abandoned any contention that the ordinance violated the Due Process Clause (XIV Amendment) or the War Powers Clauses (Art. I, Sec. 8, Clauses 11-14) of the United States Constitution (A. 55), and withdrew these issues from the District Court's consideration (A. 66-67).

2. Course of Proceedings and Disposition.

The original complaint herein was filed on May 14, 1970 (A. 2) together with an application for a temporary restraining order and an order to show cause why a preliminary injunction against the enforcement of the ordinance pending trial should not issue [R. 421]. The application was granted and the hearing on the preliminary injunction was held on May 27, 1970 [R. 421]. At the request of Lockheed the temporary restraining order was dissolved and the hearing on the order to show cause placed off calendar as to Lockheed [R. 421]. Pursuant to stipulation between PSA and the defendants, the temporary restraining order was continued in effect so as to permit PSA to continue its 11:30 p.m. Sunday night flight from Hollywood-Burbank Airport until July 12, 1970, and PSA withdrew its application for a preliminary injunction [A. 83-84; R. 421]. As a result the ordinance became effective again on July 13, 1970 and continued in effect until November 30, 1970.

The trial took place on September 15, 16 and 17, 1970 (A. 3). On November 30, 1970 the findings of fact, conclusions of law and judgment were signed and filed and the judgment entered (A. 4). The judge

ment of the District Court declared the ordinance unconstitutional, illegal and void and enjoined its enforcement (A. 408). In reaching this conclusion the District Court held the ordinance to be repugnant to the Supremacy Clause (preemption and conflict) and to the Commerce Clause (A. 405).

The Court of Appeals, in deciding the case, limited itself to the issue whether the ordinance was repugnant to the Supremacy Clause in two aspects, namely, (1) preemption and (2) conflict (A. 414). While there was unanimity on the conflict issue and affirmance of the judgment of the District Court, one of the three judges refused to concur in that portion of the opinion which dealt with the preemption issue (A. 427).

3. Relevant Facts.

Hollywood-Burbank Airport.

Hollywood-Burbank Airport is located in a thickly populated area (A. 373, 393) and entirely within the City of Burbank except approximately 2,050 feet of the northernmost portion of its "North-South" runway which lie in the City of Los Angeles (A. 380-381). The "North-South" runway is the preferential runway for take-off (from north to south), not only because of its greater length (approximately 6,900 feet), but also because of its southerly slope and the fact that the prevailing wind is generally from the south (A. 157-159). Aircraft taking off to the south over-fly a residential area within the City of Burbank from one-third to one-half mile distant (A. 336). Hollywood-Burbank Airport also has an "East-West" runway (A. 381) approximately 6,000 feet in length (A. 156). Aircraft departing to the east on this runway over-fly a residential area within the City of Burbank somewhat closer

than the residential area to the south (A. 455). Aircraft departing to the west over-fly that portion of the City of Los Angeles known as North Hollywood (A. 74). The FAA Departure Charts for Hollywood-Burbank Airport [Pl. Ex. 7, A. 452-453, 103] specify minimum climb rates for departing aircraft varying from 260 feet to 347 feet per nautical mile.

None of the runways at Hollywood-Burbank Airport can accommodate the larger jet aircraft, such as the 707 and the DC-8 (A. 141). They are generally sufficient to accommodate the smaller jet aircraft such as the 727, the DC-9 and the 737 (A. 142). Lockheed achieved the runway lengths indicated by extending these runways to the limits of the property which it owns or controls [Pl. Ex. 2, A. 428-429, 98].

Hollywood-Burbank Airport is used by United Air Lines, Western, Air West and Pacific Southwest Air Lines, and now possibly by Continental Air Lines, as an alternate to Los Angeles International Airport (LAX) when landing there is precluded by weather conditions (A. 170).

United Air Lines, Western, Air West, Continental Air Lines and Pacific Southwest Air Lines also utilize Hollywood-Burbank Airport for regularly scheduled flights (A. 383).

The problem with respect to noise created by aircraft taking off or landing at Hollywood-Burbank Airport dates from about 1965 when jet aircraft began using the airport on a regular basis (A. 142). The first

There have been instances when air carriers have had to reduce their load in order to take off, because of wind (calm) and temperature (hot) conditions (A. 323).

official recognition of the adverse environmental effects of this jet aircraft traffic was in the latter part of 1967 when the FAA Chief of the Airport Traffic Control Tower at the airport established non-mandatory procedures for take-offs and landings in an attempt to reduce noise complaints (A. 112). These procedures were modified several times, the last of which (dated September 4, 1969) provided, on a non-mandatory basis, that Runway 25 (take-offs to the west on the "East-West" runway) should be used as much as possible for departures of turbine powered aircraft during the period from 2300 to 0700 when people are asleep [Pl. Ex. 30, A. 453, 113]. The only discernible effect of this procedure was an increase in complaints by people living west of the airport (A. 317). The number of complaints from south of the airport remained about the same (A. 319).

Burbank Ordinance.

On March 31, 1970 the City Council of the City of Burbank duly and regularly adopted Ordinance No. 2216 which added Section 20-32.1 to the Burbank Municipal Code to provide as set forth above. It became effective on May 4, 1970. (A. 378). Its prohibitions were two-fold, one making it unlawful for the pilot of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 p.m. of one day and 7:00 a.m. the next day, and the other making it unlawful for the operator of the Hollywood-Burbank Airport (Lockheed Air Terminal, Inc.) to allow a pure jet aircraft to take off from the airport during such periods. Flights of an emergency nature were excepted. Prior to the effective date of this ordinance, Mr. Da-

vid M. Simmons, President of Lockheed, submitted to the City of Burbank a list of what he considered to be flights of an emergency nature which would justify a jet departure during the hours proscribed [Def. Ex. A, A. 518, 179] and by letter dated May 1, 1970 [Def. Ex. A-1, A. 520, 180], Mr. Simmons was advised by the City Attorney that the list of emergency conditions appeared reasonable and would be used by the Police Department at least for the time being. He also advised that a 6:40 a.m. charter flight by Lockheed-California specialists to Palmdale each working day had been cleared as an emergency flight. Among the other departures authorized as emergency flights were aircraft scheduled for departure prior to 2300 which had been delayed by mechanical problems, weather or air traffic control procedures; aircraft which had to land because of emergency conditions; and aircraft which, because of weather conditions at the airport of their destination, had to utilize Hollywood-Burbank Airport as an alternate. The City of Burbank abided by these emergency conditions (A. 180).

The only regularly scheduled flight affected by the ordinance was an intrastate flight of Pacific Southwest Air Lines (an intrastate air carrier) originating in Oakland, California and departing from Hollywood-Burbank Airport at 11:30 p.m. each Sunday night for San Diego (A. 394).^{*}

^{*}The departure time for this flight has since been moved forward to 10:50 p.m. by PSA even though, at the time it did this, the Burbank ordinance was no longer in effect because of the District Court's injunction.

The only other flights affected by the ordinance were principally departures (at least three per week) of corporate jet aircraft (A. 395).

Federal Regulation.

Lockheed, as the proprietor and operator of the Hollywood-Burbank Airport, is not subject to Federal economic or other regulation, except in terms of the *safety* of its operation.⁹ It establishes its own schedule of rates and charges for the use of the airport by air carriers and other aircraft, and such schedule is not subject to approval of the Civil Aeronautics Board, the Federal Aviation Administration or any other governmental agency or body (A. 170). Lockheed's consent must be obtained for use of its airport by an air carrier even though a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board specifies that airport as one of the points on the route

⁹Section 612 (49 U.S.C. §1432), which was added to the Federal Aviation Act of 1958 in 1970, became effective on May 21, 1972. That section authorizes the Federal Aviation Administrator "to issue airport operating certificates to airports serving air carriers certificated by the Civil Aeronautics Board and to establish minimum *safety* standards for the operation of such airports." It further provides that "any person *desiring* to operate an airport serving air carriers certificated by the Civil Aeronautics Board *may* file with the Administrator an application for an airport operating certificate." The Administrator is required to issue an operating certificate to any airport proprietor applying therefor if he "finds, after investigation, that such person is properly and adequately equipped and able to conduct safe operation in accordance with the requirements of this Act and the rules, regulations, and standards prescribed thereunder. . . .". Additionally he must prescribe in the operating certificate "such terms, conditions, and limitations as are reasonably necessary to assure *safety* in air transportation. . . ." (Italics added).

[Pl. Ex. 35 at p. 13, A. 118].¹⁰ As a matter of policy, Lockheed supports route applications before the Civil Aeronautics Board or the California Public Utilities Commission which would entail the use of its facilities, to demonstrate that it is in full accord (A. 147), and has had no occasion to do otherwise because the airport has had excess capacity for a number of years (A. 168). In addition, Lockheed may exclude any aircraft on the basis of noise and impose operational regulations on the airlines using the airport (A. 171-172), including a restriction on runway use and hours of operation.¹¹ It may substantially reconstruct its airport or alter the runway layout without FAA approval.¹²

In sharp contrast to the foregoing and as to those who use the *navigable* airspace, Federal control and regulation is detailed and extensive. Some of the more important of these Federal controls and regulations are

¹⁰Additionally, subsection (i) of Section 401 (49 U.S.C. §1371(i)) of the Federal Aviation Act of 1958 provides that a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board does not "confer any proprietary, property, or exclusive right in the use of any airspace, Federal airway, landing area, or air-navigational facility." (Italics added).

¹¹*Supra*, footnote 2. See also *Port of New York Authority v. Eastern Airlines*, 259 F. Supp. 142 (1966). The issue in that case was the Port of New York Authority's right to prohibit jet aircraft from using a recently completed runway at LaGuardia Airport until the construction of a second runway was completed. The Authority wanted to avoid the concentration of jet aircraft noise which would have resulted from the use of this runway alone. The District Court supported the Authority's right to do so and granted injunctive relief.

¹²In such cases it is only required to give the Federal Aviation Administrator "reasonable prior notice thereof . . . so that he may advise as to the effects of such construction on the use of airspace by aircraft." (49 U.S.C. §1350).

set forth at length in the Findings of Fact of the District Court (A. 375).

As to the control and abatement of aircraft noise, Section 611 (49 U.S.C. §1431) of the Federal Aviation Act of 1958 requires and empowers the Federal Aviation Administrator to "prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise." Acting under this authority, the Administrator has adopted regulations prescribing noise standards for all *new* subsonic turbojet-powered aircraft (34 Federal Register 18355-18356, Nov. 18, 1969, now published at 14 C.F.R. Part 36). However, in doing so, he stated that "The noise limits specified . . . are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce", and further "that the Federal Aviation Administration makes no determination, under Part 36, on the acceptability of the prescribed noise levels in any specific airport environment."

In addition, the Federal Aviation Administrator has established operational regulations which require turbine powered fixed wing aircraft to maintain an altitude of at least 1,500 feet within an airport traffic area until further descent is required for a safe landing, and to climb to 1,500 feet as rapidly as practicable, when taking off (14 C.F.R. §91.87(d), (f)).

SUMMARY OF ARGUMENT.

The following is a summary of the principal points set forth and the contentions made in the Argument to follow. This summary follows the seven principal subdivisions of the Argument.

1. The Problem.

Noise pollution and, in particular, noise created by jet aircraft is affecting millions of people in this country psychologically, physiologically and sociologically. Jet aircraft noise during normal sleeping hours has a compounding impact on residents in the vicinity of airports because the noise cannot be assimilated as it is during the day with other noises. The present level of noise created by jet aircraft is indefensible and irresponsible. The Federal Aviation Administration has demonstrated complete and utter lack of willingness to provide any meaningful relief from jet aircraft noise. The net result is that airport proprietors are not regulated in terms of permissible level of noise which may be created by aircraft using their airports. The lower Federal Courts have likewise refused to provide such relief.

2. The Preemption Issue.

The Federal acts relating to air commerce and the exercise of Federal commerce power do not prevent State action consistent with that power where the State action or regulation is designed to protect the health or welfare of those who reside or work in a particular State or community. There is nothing in the Federal Aviation Act of 1958 (49 U.S.C. §1301, *et seq.*) which would suggest that Congress intended to preempt the regulation of airport proprietors. The

validity of a claim of Federal preemption cannot be judged by reference to broad statements about the "comprehensive" nature of Federal regulations or the "exclusive jurisdiction" of Congress. The Burbank ordinance does not impinge on an area inherently requiring national uniformity. In fact national uniformity in this area of regulation is neither desirable nor possible. The Federal Aviation Administrator himself has declared that this form of locally responsive noise control is in the "national interest" and is not incompatible with the primary reason for the Federal Aviation Act of 1958. He has set the pattern for this by imposing more severe restrictions on the use of the Washington National Airport during the late evening and early morning hours. He has further refused to make any determination as to what would be acceptable levels of noise in particular airport environments. Decisions of this Court sustain the proposition that so long as any power of the Federal Aviation Administrator remains "dormant and unexercised" States and local governments may regulate in this area. This Court has further held that State or local governmental regulations are permissible in the area where a Federally regulated enterprise has freedom to act. In this case Lockheed had the freedom and discretion to take the action necessary to exclude aircraft on the basis of noise considerations. Accordingly, the City of Burbank had the power to require Lockheed to exercise this discretion in the manner as set forth in the Burbank ordinance.

3. The Conflict Issue.

The Court of Appeals resolved the conflict issue against the Appellants by concluding that the Burbank ordinance "stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress." The conflict which it found was with respect to a *non-mandatory* runway preference order of a minor FAA official in charge of the Air Traffic Control Tower at Hollywood-Burbank Airport. It viewed the non-mandatory runway preference order as a determination by the FAA that no further steps could properly be taken to alleviate the noise pollution resulting from operations at the Hollywood-Burbank Airport. This so-called "determination" was itself in conflict with other determinations made by the Federal Aviation Administrator. The only weight that can be properly accorded to the FAA Tower Chief's determination is that of all noise abatement runway procedures he had attempted, this last one had the best prospects of achieving the greatest noise reduction. As to the effect of the Burbank ordinance on the 11:30 p.m. PSA Sunday night flight, the convenience of the persons departing on that flight as well as the convenience of those who wish to utilize corporate jet aircraft during the period proscribed by the Burbank ordinance, must be weighed against the need of thousands of persons who reside in the vicinity of the Hollywood-Burbank Airport for uninterrupted sleep. As to the Certificates of Public Convenience and Necessity issued by the Civil Aeronautics Board, such certificates confer no right to utilize a particular airport.

4. Burden on Interstate Commerce.

There is no evidence in this case that the Burbank ordinance imposed or would impose *any* burden on interstate commerce. The evidence introduced in this case to demonstrate the effect the Burbank ordinance would have if it were applied to all major airports throughout the United States is purely an attempt to cloud the issue. The extent to which air commerce requires a single authority in control is a legislative question, not a judicial question. Up to the present time Congress has not seen fit to place airports utilized by air commerce under the control of any Federal agency, and airport proprietors are not subject to Federal economic or other regulation except in the area of airport safety.

5. Violation of Fifth, Ninth and Tenth Amendment Rights.

Lockheed, as the proprietor and operator of the Hollywood-Burbank Airport, is riding roughshod over the rights of owners of property surrounding the airport in violation of the Fifth Amendment. Their liberty and the use of their property are severely restricted by the adverse environment imposed on them by a private corporation for private gain, and without just compensation having been paid. The Burbank ordinance seeks in some degree to preserve Fifth Amendment rights until due process is satisfied and just compensation paid. If the Fifth Amendment is not applicable, there is a respectable body of opinion that the right to a decent environment is one of the rights retained by the

people under the Ninth and Tenth Amendments, and that action which leads to the destruction of the environment may be restrained or limited.

6. *Griggs v. Allegheny County.*

Griggs v. Allegheny County, 369 U.S. 84 (1962), and the decisions of the Court of Appeals and the District Court in this case cannot stand together. If the decision in this case is allowed to stand without reversal of *Griggs*, then the Federal Aviation Administration will be able to continue its questionable course of conduct without interference, and the Federal government and the airlines will remain shielded from liability for their actions or non-action.

7. *The Solution.*

There can be no question that interim measures, such as the Burbank ordinance, are morally, socially and environmentally necessary. The preemption and conflict doctrines of this Court mark out a sufficient area in which interim measures, such as the Burbank ordinance, can fit, without violation of the Supremacy Clause of the United States Constitution.

Should *Griggs* be reversed so that Federal government and the airlines would become liable for the "taking" of air or noise easements, and, more importantly, should this Court sustain the Burbank ordinance, there is every prospect that the airlines and the Federal Aviation Administration would then be able to prevail on Congress to declare a preemption of this field. If such should

occur, then, under existing preemption and conflict doctrines, the States and local governments, and the Courts, would be powerless to protect their citizens from the adverse effects of jet aircraft noise pollution, even though Congress, or the agency which administers its laws, has failed to take adequate and effective steps to protect the health, safety and welfare of these citizens.

This Court is, therefore, respectfully urged to reexamine the preemption and conflict doctrines as presently enunciated and take upon itself the burden of defining those areas in which States and local governments may properly exercise their police powers, and the Courts may act, notwithstanding a declaration of Federal preemption. It is suggested that a proper rule would be that such State and local governmental enactments, and Court applied restraints, would be valid, provided it is demonstrated that the enactment or restraint in question is reasonable and necessary under the circumstances. Such a rule would find adequate support under the Ninth and Tenth Amendments.

ARGUMENT.

1. The Problem.

We are before this Court because there is no other place to go for relief. Legislation before Congress, which held some promise of future relief from jet aircraft noise by transferring the Federal Aviation Administrator's powers under Section 611 (14 U.S.C. §1431) of the Federal Aviation Act of 1958 to the Administrator of the Environmental Protection Agency (Senate Bill No. 3342 introduced March 14, 1972), failed to survive under the combined assault of the airlines and the Federal Aviation Administration.

Noise Pollution.

The effect and extent of noise pollution in this country, as revealed during the course of Congressional debate on this bill and a companion bill in the House of Representatives (H.R. 11021) are frightening. According to an Environmental Protection Agency report, noise appears to affect to a measurable degree of impact at least 80 million persons, or approximately 40% of the present population of the United States. Of that number, at least one-half are believed to be risking potential health hazards, hearing impairment in particular, as the result of long enduring exposure to noise.¹⁸ The effect is psychological, physiological and sociological. There is proof that many people in our mental institutions have been put there as a result of excessive noise and irritation caused by noise. Noise affects the body physically and can cause different diseases. As many as 44 million persons in the United

¹⁸118 Cong. Rec. (daily ed. Feb. 29, 1972) No. 29 at p. H 1509.

States have the utility of their dwellings adversely affected by noise from traffic and aircraft.¹⁴ Noise can be a cause of accidents by masking auditory warnings and by increasing annoyances and fatigue and decreasing alertness.¹⁵ Aircraft noise during the normal sleeping hours has a compounding impact on residents because the noise cannot be assimilated as it is during the day with other noises. One jetliner taking off at midnight has 10 times the effective noise impact of the same plane taking off at noon.¹⁶ Noise pollution is the greatest non-killing health hazard in America today.¹⁷

In terms of destruction of our environment noise pollution ranks with air and water pollution.¹⁸ Noise caused by jet aircraft and its effects are well documented in definitive works on this subject.¹⁹ The intensity and effect of noise pollution resulting from operations at Hollywood-Burbank Airport and other airports in the Los Angeles area, and the prospects for the future, have been the subject of a specific study.²⁰ This study reveals that in areas immediately surround-

¹⁴*Id.* at p. H 1510.

¹⁵*Id.* at p. H 1518.

¹⁶*Id.* at p. H 1534.

¹⁷*Id.* at p. H 1510.

¹⁸Panel on Noise Abatement, Dept. of Commerce, *The Noise Around Us 2* (1970).

¹⁹Hildebrand, *Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research*, 70 Colum. L.Rev. 62; Wyle Laboratories Research Staff, *Supporting Information for the Adopted Noise Regulations—Final Report to the Department of Aeronautics* (Report No. WCR 70-3 (R)), 1971; California Department of Public Health, *A Report to the 1971 Legislature on the Subject of Noise Pursuant to Assembly Concurrent Resolution 154, 1970* (1971).

²⁰Branch and Beland, *Outdoor Noise and the Metropolitan Environment—Case Study of Los Angeles with Special Reference to Aircraft*, 1970 (Library of Congress Catalog Card No. 72-13027).

ing airports, low-flying aircraft and those taking off, taxiing and testing engines on the ground generate the most intense and frequent noise in the city.²¹ It further reveals that the smaller jet aircraft of the type which utilize the Hollywood-Burbank Airport produce an unacceptable level of noise (100 plus PNdb) over an area approximately one mile in width and extending from two to three miles from the end of the airport's runways.²² It further noted that noise levels in excess of 87 PNdb cause substantial speech interference and produce various temporary changes in the physiological state. The most important of these is a reduction in the size of the median and smaller arterials. Some of the side effects of this phenomenon are an increase in pulse rate, a paling of the mucous membrane throughout the organism, and an increase in respiration rate. In addition, rest and relaxation is interfered with to a substantial degree. It is the conclusion of this study that although apparently higher sound levels can be tolerated by man without permanent damage or breakdown from this cause alone, an urbanwide limit above 87 PNdb would be indefensible and irresponsible.²³ As to aircraft noise specifically, it is stated that such noise in excess of 82 PNdb impairs conversation and reading outdoors, and generally disturbs concentration, especially when aircraft over-flights are frequent and the climate favors outdoor activity, and that aircraft noise is psychologically more intrusive because of its contrast with the usual sound level and its relatively "sudden" occurrence.²⁴

²¹/d. at p. 8.

²²/d. at p. 21.

²³/d. at p. 40.

²⁴/d. at p. 41.

Posture of the Federal Aviation Administration.

Turning now to the posture and lack of effort on the part of the Federal Aviation Administration with respect to aircraft noise abatement, the statements of various members of Congress in the course of the debates on the bills referred to above are particularly revealing (these statements were made in an unsuccessful attempt to persuade the House of Representatives to shift aircraft noise abatement authority from the Federal Aviation Administrator to the Administrator of the Environmental Protection Agency):

Congressman Wydler:

"The problem is, however, although they [FAA] have competence they have shown to the Congress of the United States and to the American people a complete and utter lack of willingness to use the authority which we give them to set the limits on jet noise which they should be setting.

"In other words, Mr. Chairman, it is not enough to say that the FAA is competent to do the job. The question we have to answer in this House today is whether the FAA intends to do the job and intends to do anything to utilize the powers that we gave them or whether they intend to remain, as they apparently have over the years, a very willing partner of the airline industry in keeping effective regulations from being put into effect.

"Mr. Chairman, if you will look at the record of the FAA in this field, you will see that what I am saying is a fair and just statement. The Congress three and a half years ago in 1968 passed a bill which would have given and in fact did give the FAA the power to take action in the area of re-

ducing jet noise for presently flying aircraft. Those are the aircraft making the noise and the aircraft which will be making the noise for the next decade or 15 years. We gave to the FAA the power to reduce noise in those aircraft and set limits which could have meant that they would be retrofitted with noise suppression devices to bring the levels of noise down. For three and a half years the FAA stalled us and the American people and has taken the position that industry wanted them to take and done nothing."²⁶

Congressman Mikva:

"If the past is any guide, we are not likely to bring much relief to residents in the vicinity of our airports by turning over to the FAA the power to set noise standards for airplanes."²⁶

Statements of other Congressmen on this subject are found in the footnotes.²⁷ These statements confirm

²⁶118 Cong. Rec. (daily ed. Feb. 29, 1972) No. 29 at p. H 1515-16.

²⁷*Id.* at p. H 1517.

²⁷118 Cong. Rec. (daily ed. February 29, 1972) No. 29: Congressman Ryan:

"Unfortunately history has demonstrated the reluctance of the FAA to undertake a meaningful program of aircraft noise abatement." (at p. H 1519)

Congressman Drinan:

"In the original version of this legislation the EPA had veto power over the FAA-drafted standards, but in this bill it has been stripped of that power.

"In view of the FAA's history of being dominated by the very industry it is supposed to regulate, I consider this change highly unfortunate." (at p. H 1520)

Congressman Badillo:

"The FAA continues to be dominated by the airline industry which has consistently opposed any retrofit requirements for the existing jet fleet. As a result, the din of jet noise over city and suburb has become unbearable." (at p. H 1512)

what others have been saying regarding the failure of the Federal Aviation Administration to provide any meaningful relief from jet aircraft noise.²⁸ Oftentimes these comments are less restrained.²⁹ A good example of

Congressman Fraser:

"The Federal Aviation Administration—FAA—has failed in the task assigned it by Congress 3 years ago—to quiet the noise of jet aircraft operating in and out of our Nation's airports." (at p. H 1523)

Congressman Gude:

"The FAA has failed time after time to move in regard to this jet noise problem." (at p. H 1530)

* * * *

"It is high time for the Congress to act to silence the jets. The Federal Aviation Administration has had the authority to impose jet noise restrictions for some 3½ years. Their lack of substantive action to date would indicate to me that, at best, a certain ennui has settled over the FAA." (at p. H 1530)

Congressman Addabbo:

"The FAA has been all along and for too long airline oriented." (at p. H 1531)

* * *

"The people's health should not be secondary to the economics of the airlines." (at p. H 1531)

"One commentator has described the situation in this fashion:

"The FAA has attempted to play both ends against the middle—with the private citizens winding up in the middle. It piously states that no complete answer can come from the federal government and that local regulation is both necessary and desirable. At the same time, it accepts with open arms the court determinations that any action to relieve the noise nuisance of aircraft must come from the federal government, i.e., the FAA, and impedes action by municipalities which goes beyond programs of 'compatible land use.' It seems to be going out of its way to limit local regulation while providing little in the way of a national solution; and this serves only the interest of one segment of the public—the industry it was set up to regulate." Berger, *Nobody Loves an Airport*, 43 So. Cal. L.R. 631, at p. 724 (1970).

²⁸See Kanner, *Some of My Best Friends Use Airports*, 12 California Trial Lawyers Journal, Spring, 1972, No. 2, pp. 61-71; Berger, *You Know I Can't Hear You When the Planes Are Flying*, 4 Urban Lawyer 1 (1972); Fadem & Berger, *A Noisy Airport Is a Damned Nuisance*, 3 Southwestern Univ. L.R. 39 (1970).

this "no-action" policy of the Administrator is found in his opinion in *In the Matter of the Petition of Jordan A. Dreifus*, FAA Regulatory Docket No. 9071, the full text of which is set forth in the Appendix to this Brief (p. 4).

It is worthy of note that at every opportunity the Federal Aviation Administration expressly disclaims that the noise standards which it adopts are acceptable in any specific airport environment and following its previous pattern declares that airport owners acting as proprietors can deny the use of their airports to aircraft on the basis of noise considerations.⁶⁰ The net result is that airport proprietors are *not* regulated in terms of the permissible level of noise which may be created by aircraft using their airports. This attitude and approach by the Federal Aviation Administration allows the Federal government to remain immune from liability for aircraft noise under *Griggs v. Allegheny County*.⁶¹ It also permits the Federal Aviation Administration to parry the thrust of citizens' complaints by pointing to the airport proprietor as the culprit. As a result we have the "lacuna" about which the California Supreme Court warned in *Loma Portal Civic Club v. American Airlines, Inc.*⁶²

Even in the one area where the Federal Aviation Administrator has acted—the adoption of noise stand-

⁶⁰Letter dated June 22, 1968 from the Secretary of Transportation to the Committee on Interstate Commerce contained in Senate Report No. 1353, 90th Cong. 2d Sess. 6-7 (1968); *In re Dreifus*, FAA Regulatory Docket No. 9071 (7/10/69); 14 C.F.R. §36.5. (These are included in the Appendix to this Brief).

⁶¹369 U.S. 84 (1962).

⁶²61 Cal.2d 582, 39 Cal.Rptr. 708, 394 P.2d 548, at p. 554 (1964).

ards for new subsonic turbojet-powered aircraft—his actions again demonstrated a lack of concern for the needs of people and a subservience to the aircraft industry. Prior to the adoption of these standards, the FAA had stated that it was "well within the state of the art" to achieve noise levels of 106 EPNdb (this is a refinement of the PNdb concept which takes into account the duration of noise and pure tones such as the whine of a jet engine) measured at three statute miles from the start of take-off, one statute mile from the landing threshold, and 1,500 feet from the centerline of the runway.³³ In spite of this, the standards as actually promulgated permit noise levels of 108 EPNdb at points farther from the runway than originally proposed and levels as high as 110 EPNdb, if a greater reduction of sideline noise is achieved.³⁴ The difference between 106 EPNdb, as originally suggested, and 110 EPNdb represents a substantial increase—approximately 50%. To make matters worse, the Administrator exempted from these standards the first group of approximately 160 Boeing 747's.³⁵ Other exemptions will no doubt be forthcoming.

The Administrator's record with respect to existing jet aircraft is equally unimpressive. In July of 1970 he released a study prepared by Rohr Corporation³⁶ which

³³Letter, J. D. Blatt, Associate Administrator, FAA, to William M. Allen, President of Boeing Co., Sept. 1, 1966; Letter from Airport Operators Council International to FAA, May 16, 1969.

³⁴14 C.F.R. §36.5.

³⁵Lesser, *The Airport Noise Problem: Federal Power But Local Liability*, 3 Urban Lawyer 175 at p. 204 (1971). See also Berger, *Nobody Loves An Airport*, 43 So.Cal.L.R. 631 (1970) at pp. 771-774.

³⁶Final Report FAA-NO-70-11 by Rohr Corporation, dated July, 1970, prepared for Department of Transportation, Federal Aviation Administration.

(This footnote is continued on next page)

reached the conclusion that the 727's, the 737's and the DC-9's (the largest type of jet aircraft presently in use at the Hollywood-Burbank Airport) could be retrofitted to achieve reductions of 5 EPNdb in noise levels on take-off and 10 EPNdb on landing, and in the case of 707 and DC-8 jet aircraft, reductions of 8 EPNdb on take-off and 13 EPNdb on landing. That these reductions would be substantial is borne out by the fact that a reduction of 8 EPNdb on take-off noise of the 707 and DC-8 jet aircraft would drop the annoyance level by 45% and a reduction of 13 EPNdb would drop the annoyance level by some 60%." The study further advises that the cost of retrofitting could be recovered through nominal fare increases." The release of this report was followed in November of the same year by the issuance of an FAA Advance Notice of Proposed Rule Making concerning civil airplane noise reduction retrofit requirements." Although hearings have been held on this subject by the Federal Aviation Administrator, nothing resulted, and in the early part of this year the Administrator postponed further consideration of the matter for 18 months."

eral Aviation Administration, Office of Noise Abatement, *Economic Impact of Implementing Acoustically Treated Nacelle and Duct Configurations Applicable to Low Bypass Turbofan Engines*.

"Supra, footnote 35.

"Supra, footnote 36.

"35 Federal Register 16,980 (Nov. 4, 1970).

"118 Cong. Rec. (daily ed. February 29, 1972) No. 29 at p. H 1538. In that regard Congressman Biaggi stated:

"Congress passed the Noise Abatement Control Act in 1968 authorizing the FAA to set noise limits and require

An equally distressing aspect of this matter is to find the Federal Aviation Administrator joining with the Air Transport Association in almost every recent case involving attempts by State and local governments to do something constructive and necessary with respect to noise pollution caused by jet aircraft.⁴¹ This case is a good example. Shortly after Lockheed and PSA withdrew their application for preliminary injunction on May 27, 1970, so that the Burbank ordinance would be effective again on July 13, 1970, the Air Transport Association filed an application to intervene as a plaintiff and the application was granted. From that time on the case was substantially under the control of the attorneys of that organization and this control has continued up to the present time. Amicus briefs were filed by the Federal Aviation Administration in the District

the installation of jet noise suppressors on existing aircraft. In November of 1970—almost 2 years after receiving the authority—the FAA issued an announcement of proposed rulemaking to require installation of noise suppression devices on existing jets.

"At the time, I lauded this action as a definite step forward in reducing noise pollution in metropolitan areas such as New York. Had the FAA continued on its plan of action at that time, a rule could have been formulated by now and citizens could have looked forward to less noise in a few years.

"But no, the FAA buckled down under the pressure of the airlines industry and *in the spring of this year announced an 18-month delay in the rulemaking procedure.* I can only presume that this Agency intends to wait until such a rule is no longer needed." (*Italics added*).

⁴¹*e.g., Opinions of the Justices of the Supreme Judicial Court of Massachusetts*, 271 NE 2d 354 (1971); *Air Transport Association of America, et al. v. City of Inglewood, et al.* (No. 71-1153-CC) and *United States (Federal Aviation Administration) v. City of Inglewood, et al.* (No. 71-1632-CC), in the United States District Court for the Central District of California, both of which involved the validity of an ordinance of the City of Inglewood which imposed noise limitations on aircraft which fly below the minimum altitude of flight prescribed by the FAA for landing and take-offs.

Court and the Court of Appeals. This same practice, with some variations, has been followed in other cases.⁴³ Two state court cases apparently escaped their notice, one in California⁴⁴ and one in New Jersey,⁴⁵ both of which held that the Federal government had not preempted the field in which we are involved.⁴⁶

Relief Through the Courts.

The decision of the Court of Appeals in this case, buttressed as it is by the decision of the District Court, is one more nail in the environmental coffin. The decision has already been cited and used in denying relief to those seeking some relief from the adverse effects of noise pollution caused by jet aircraft.⁴⁷ In June of 1971 the Governor of the State of Rhode Island cited the District Court's decision as a ground for vetoing a bill enacted into law by the Rhode Island Legislature which would have prohibited the scheduling of commercial airline flights to or from the Providence Airport between 11:00 p.m. and 7:00 a.m.⁴⁸ These de-

⁴³*Supra*, footnote 41.

⁴⁴*Stagg v. Municipal Court of Santa Monica Judicial District*, 2 Cal.App.3d 318, 82 Cal.Rptr. 578 (1969).

⁴⁵*Township of Hanover v. Town of Morristown*, 108 NJ Super. 461, 261 Atl. Rptr. 2d 692 (1969).

⁴⁶It is reported that ATA and others are attempting to intervene in the New Jersey case. It is also reported that the FAA is seeking a Federal Court injunction to enjoin enforcement of the court imposed curfew on the Morristown Airport on the ground that it violates the Supremacy Clause. See *Aviation Week & Space Technology*, Nov. 6, 1972, at p. 19.

⁴⁷It was cited by the District Judge in the Inglewood case referred to in footnote 41, *supra*, in holding that the Inglewood ordinance violates the Supremacy Clause. It was also cited in *Virginians for Dulles v. Volpe*, 344 F. Supp. 573 (1972) as authority for denying relief to those residing in the vicinity of Washington National Airport.

⁴⁸Message of Governor dated June 22, 1971.

cisions are of course but a continuation of decisions of other Federal lower courts.⁴⁸ But as noted in our Jurisdictional Statement, the decision of the Court of Appeals is the first decision of courts of that level which has unequivocally held as a *matter of law* and no matter what the circumstances may be, that States and local governments have no power to enact any regulations relating to airport proprietors.⁴⁹ It is the purpose of the ensuing argument to demonstrate that this seemingly impenetrable facade of Federal power, which has been constructed bit by bit through the decisions of the lower Federal courts, should and must be breached.

2. The Preemption Issue.

Forgotten in the rush to declare the supremacy of Federal power in the area of aircraft noise abatement, is the fact that regulation of aircraft and the use of the navigable airspace derives not from the Supremacy Clause, but from the Commerce Clause. The Federal acts relating to air commerce, such as the Federal Aviation Act of 1958, are based on the power granted to the Federal government to regulate commerce and not on national ownership of the navigable air space, as distinguished from sovereignty. And the exercise of Federal commerce power does not prevent state action consistent with that power. This was made clear in *Brumff Airways v. Nebraska State Board*, 347 U.S.

⁴⁸*American Airlines, Inc. v. Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd* 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969); *Allegheny Airlines, Inc. v. Cedar-Rapids*, 238 F. 2d 812 (2d Cir. 1956); *American Airlines Inc. v. Audubon Park*, 297 F.Supp. 207 (W.D.Ky. 1968), *aff'd per curiam*, 407 F. 2d 1306 (6th Cir. 1969), *cert. denied*, 396 U.S. 845 (1969).

⁴⁹*Id.* State. p. 10.

590 (1945), where the Court stated (347 U.S. at page 596, 597):

"These Federal Acts regulating air commerce are bottomed on the commerce power of Congress, not on national ownership of the navigable air space, as distinguished from sovereignty."

* * * *

"The commerce power, since *Gibbons v. Ogden* (US) 9 Wheat. 1, 193, 6 L ed 23, 69, has comprehended navigation of streams. Its breadth covers all commercial intercourse. But the federal commerce power over navigable streams does not prevent state action consistent with that power. *Gilman v. Philadelphia* (US) 3 Wall. 713, 729, 18 L ed 96, 100. Since, over streams, Congress acts by virtue of the commerce power, the sovereignty of the state is not impaired."

Likewise forgotten is the fact that this Court has been less willing to find preemption where the state action or regulation is designed to protect the health or welfare of those who reside or work in a particular State or community. This was amply demonstrated in the decision of this Court in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

With these preliminary observations, we will proceed with an examination of the preemption issue.

No Express Preemption.

There is nothing in the Federal Aviation Act of 1958 (49 U.S.C. §1301, *et seq.*) which would suggest that Congress intended to preempt the regulation of airport proprietors. In fact the Act itself suggests to

the contrary. Section 1106 of that Act (49 U.S.C. §1506) provides as follows:

"Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

In *Head v. Board of Examiners*, 374 U.S. 424 (1963), Mr. Justice Brennan, in commenting on an identical provision contained in the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§151 *et seq.*, stated (separate concurring opinion 374 U.S. pages 443-444):

"Rather than mandate ouster of state regulations, several provisions of the Communications Act suggest a congressional design to leave standing various forms of state regulation, including the form embodied in the New Mexico statute. First, the Act contains a 'saving clause,' 47 U.S.C. §414, providing that 'Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.' Of course, such a general provision does not resolve specific problems, *Arrow Transp. Co. v. Southern R. Co.*, 372 US 658, 671, note 22, 10 L ed 2d 52, 60, 83 S Ct. 984, but *its inclusion in the statute plainly is inconsistent with congressional displacement of the state statute unless a finding of that meaning is unavoidable.*" (Italics added).

In *Loma Portal Civic Club v. American Airlines*, 61 Cal. 2d 582, 39 Cal. Rptr. 708, 394 P. 2d

548 (1964), the California Supreme Court took a similar view of the effect of the "saving clause" (49 U.S.C. §1506) in the Federal Aviation Act of 1958 (394 P. 2d 548 at page 555):

"Here we have an expression of the intent of Congress. The Federal Aviation Act expressly declares that 'Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.' (49 U.S.C. §1506.) Thus, it is clear that the federal legislation was not intended to be exclusive."

Rules for Determining Preemption.

The validity of a claim of Federal preemption cannot be judged by reference to broad statements about the "comprehensive" nature of Federal regulations under a particular Act or the "exclusive jurisdiction" of Congress. Thus in *Head v. Board of Examiners*, *supra*, it is stated (374 U.S. at pages 429-430):

"In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity of this claim cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation under the Federal Communications Act. '[T]he "question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case." Statements

concerning the "exclusive jurisdiction" of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive. *California v. Zook*, 336 US 725, 731, 93 L ed 1005, 1010, 69 S Ct 841. *Kelly v. Washington*, 302 US 1, 10-13, 82 L ed 3, 10, 12, 58 S Ct 87."

Earlier, in *California v. Zook*, 336 U.S. 725 (1949), the Supreme Court had expressed equal displeasure with the use of mechanical rules for determining congressional intent. There with respect to the "coincidence means invalidity" theory advanced in previous opinions, the Court stated (336 U.S. at pages 729 and 732-733):

"The Court could not have intended to enunciate a mechanical rule, to be applied whatever the other circumstances, indicating congressional intent."

* * * *

"In short, we would be setting aside great numbers of state statutes to satisfy a congressional purpose which would be only the product of this Court's imagination."

The reliance of the Court of Appeals and the District Court on *Rice v. Santa Fe Elevator Corp.*, 331 US 218 (1947) is misplaced. Involved in that case was the United States Warehouse Act (39 Stat. 486, c. 313), as amended. It was expressly declared in Section 29 of the Act that "the power, jurisdiction and authority" of the Secretary of Agriculture conferred under the Act "shall be exclusive with respect to all per-

sons" licensed under the Act (331 U.S. at page 233), and similar unambiguous statements were made in the reports of the Committees of the Senate and the House of Representatives (331 U.S. at pages 232-234)...

Notwithstanding this broad and positive declaration of preemption, this Court held, with respect to three other matters covered by the Illinois Public Utilities Act, as follows (331 U.S. at page 237):

"The United States Warehouse Act contains no provisions relating expressly to these three matters. And we are told that the Secretary of Agriculture has made no attempt to exercise any jurisdiction over them. But possibilities of conflict and repugnancy are conjured up."

* * * *

"Any such objections are at this stage premature. Congress has not foreclosed state action by adopting a policy of its own on these matters. Into these fields it has not moved. By nothing that it has done has it preempted those areas. And see *Federal Compress Co. v. McLean*, supra (291 US p. 23, 78 L ed 627, 54 S Ct. 267). In more ambiguous situations than this we have refused to hold that state regulation was superseded by a federal law. *Penn Dairies v. Milk Control Commission*, 318 US 261, 87 L ed 748, 63 S Ct 617."

As will be seen, the Federal Aviation Act of 1958 (49 U.S.C. §1301, *et seq.*) contains no provisions expressly relating to airport proprietors, except a provision adopted in 1970 relating to airport safety," and the Federal Aviation Administrator has made no attempt to exercise jurisdiction over them in terms of abatement of aircraft noise.

¹⁰Supra, footnote 9.

National Uniformity.

To achieve any meaningful discussion of the more recent decisions of this Court, it is first necessary to consider the proposition as to whether the Burbank ordinance impinges on an area inherently requiring national uniformity. That it does not, requires little more than a consideration of the situation at Hollywood-Burbank Airport. By any standard it is inadequate even from the standpoint of safety. It has no "clear" zones. Its runways terminate at public streets. On leaving the airport boundaries, aircraft are immediately over thickly populated areas no matter what the direction of take-off may be. In the terms used by this Court in *Griggs v. Allegheny County*,¹ this airport is "inoperable". In contrast, there are many airports throughout the country where the impact of aircraft noise on those who live or work in surrounding areas is reduced to a minimum because of favorable physical location or the acquisition of necessary clear zones and aviation easements. To say that all airports require national uniformity in terms of hours of operation or permissible levels of noise is equivalent to saying that airports must accept all types of aircraft, even though the runways of some are not adequate for the larger aircraft.

Beyond this it has been repeatedly recognized that national uniformity in this area of regulation is neither desirable nor possible. Thus in a letter dated June 22, 1968, submitted by the Secretary of Transportation to the Senate Committee on Interstate Commerce² at the time of its consideration of the addition of Section

¹369 U.S. 84 (1962).

²This letter is set out in full in the Appendix to this Brief at pp. 1-2.

611 (49 U.S.C. §1431) to the Federal Aviation Act of 1958, he stated:

"Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designated to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise consideration."

The Committee concurred in these views.³³

In connection with the adoption of aircraft type certification noise standards for new subsonic aircraft,³⁴ the Federal Aviation Administrator stated:

"The noise limits specified in Part 36 are the technologically practicable and economically reasonable limits of aircraft noise reduction technol-

³³Senate Report No. 1353, 90th Cong. 2d Sess. 6-7 (1968). See also Appendix to this Brief, p. 1.

³⁴34 Federal Register 18355-18356, November 18, 1969, now 14 C.F.R. §36.5. See also Appendix to this Brief p. 3.

ogy at the time of type certification and are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce."

Finally we have the decision of the Federal Aviation Administrator *In The Matter of the Petition of Jordan A. Driefus*, FAA Regulatory Docket No. 9071, the full text of which is set forth in the Appendix to this Brief (p. 4). The situation there presented was this. The City of Santa Monica, in response to a locally determined desire for quiet, had enacted an ordinance which provided that "no pure jet aircraft shall take off from the airport [Santa Monica Municipal Airport] between the hours of 11:00 o'clock p.m. of one day and 7:00 a.m. of the next day." At the time the Petition referred to was filed with the FAA and at the time the Federal Aviation Administrator acted thereon, the Superior Court of the State of California for the County of Los Angeles had declared the ordinance invalid because its subject matter was preempted by State law (see *Stagg v. Municipal Court of Santa Monica Judicial District* (1969), 2 Cal. App. 3d 318, 319-320, 82 Cal. Rptr. 578, 579).⁸⁸ Based on this set of facts the petitioner, whose residence near the airport was being exposed to increasing turbo jet aircraft traffic and resulting noise, requested (as set forth in the decision) the Federal Aviation Administration to amend the Fed-

⁸⁸At a later time the California Court of Appeal in the case referred to overturned the judgment of the Superior Court, holding that there was neither State nor Federal preemption of the ordinance in which the Santa Monica ordinance operated.

eral Aviation Regulations to prescribe noise restrictions and limitations for turbo jet aircraft operating at the Santa Monica Municipal Airport of the type that the City of Santa Monica had attempted to impose by its ordinance. The arguments, as stated by the petitioner, embraced all of the contentions advanced by Lockheed, PSA and ATA in this case. Petitioner argued, among other things, that "failure of the FAA to issue restrictions at Santa Monica and other airports would allow the State and local governments to issue their own airport use restrictions" and further that "the restrictions would result in chaos, confusion, interference and obstruction to aircraft operations, which could be contrary to the national interest".⁴⁴ In response to this argument, the Federal Aviation Administrator stated:⁴⁵

"Petitioner's argument 8, describing the adverse effects of local airport use restrictions is not supported by any facts or experience known to the FAA. *This form of locally responsive noise control is clearly in the national interest in the light of the quoted portion of the Senate Report.* Further, there is no indication that the noise restrictions required by petitioner would be discriminatively applied." (Italics added).

As to petitioner's further argument (9) that "failure of the FAA to issue noise abatement regulations for Santa Monica and other airports would be incompatible with the primary reason for the Federal Aviation Act of 1958, which was the unification of the control of aircraft operations in a single Federal agency to assure

⁴⁴Appendix to this Brief at p. 5.

⁴⁵*Id.* at p. 11.

safety and the orderly development of aviation",⁶⁸ the Administrator's response was as follows:⁶⁹

"Petitioner's argument 9, covering the unification objective of the Federal Aviation Act of 1958, is correct insofar as it describes the need for a single Federal agency in the field of the safe, orderly development of aviation. However, the Senate Report makes it clear that, just as the FAA recognizes the proprietary interest of airport operators by not requiring an airport to accept service, so it should recognize the proprietary interest of airport operators by not substituting its judgment, so far as acceptance of noisy aircraft by the airport is conceived, for that of the State or local governmental elements that own and operate the nation's airports."

Thus we have clear and unequivocal statements by those charged with the administration of the Federal Aviation Act of 1958 (49 U.S.C. §1301, *et seq.*), which recognize the diversity of individual airports and their environments, and the need for restrictions in terms of the permissible levels of aircraft noise in particular airport environments, including time restrictions when operational regulations have failed to provide the needed relief. This recognition is accompanied by equally positive assertions that the Federal government is in no position to, and will not, enter this area of regulation.⁷⁰

⁶⁸*Id.* at p. 5.

⁶⁹*Id.* at pp. 11-12.

⁷⁰*Id.* at p. 9.

The Burbank Ordinance Is Not Preempted.

The most pertinent of the more recent decisions of this Court is *Colorado Anti-Discrimination Com. v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963). At issue in that case was whether the Colorado Anti-Discrimination Act of 1957 was preempted by the Federal Aviation Act of 1958 and, in particular, by Section 1374(b) which prohibited air carriers from subjecting any person "to any unjust discrimination" and Section 1302(c) which required "the promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations." In holding that the Colorado Act had not been preempted by these sections of the Federal Aviation Act of 1958, this Court stated as follows (372 U.S. at pp. 723-724):

"This is a familiar type of regulation, aimed primarily at rate discrimination injurious to shippers, competitors, and localities. But we may assume, for present purposes, that these provisions prohibit racial discrimination against passengers and other customers and that they protect job applicants or employees from discrimination on account of race. *The Civil Aeronautics Board and the Administrator of the Federal Aviation Agency have indeed broad authority over flight crews of air carriers, much of which has been exercised by regulations.* Notwithstanding this broad authority, we are satisfied that Congress in the Civil Aeronautics Act of 1938, and its successor had no express or implied intent to bar state legislation in this field and that the Colorado statute, at least so long as any power the Civil Aeronautics Board may have remains 'dormant and unexercised,' will not frustrate any part of the purpose of the federal legislation." (Italics added.)

The Federal Aviation Administrator in his decision in the *Dreifus* matter made reference to the fact that the FAA, in an attempt to solve the problem, had provided for "(1) the use of a noise abatement runway when permitted by wind conditions; (2) the use of a noise abatement departure path to avoid congested areas; and (3) the use of raised traffic patterns."⁶¹ He made further reference to section 91.87 of Part 91 of the Federal Aviation Regulations which prescribes noise abatement approach, departure and runway requirements for turbine powered and large airplanes.⁶² He then observed as follows:⁶³

"Beyond these rules, and the FAA's monitoring of the Santa Monica Airport under the FAA Order, the FAA believes that further relief from aircraft noise *should involve* airport use restrictions similar to those that petitioner states were issued in the Santa Monica City Ordinance. In short, the FAA at present does not know of any action, short of the type attempted by Santa Monica, that will satisfy the needs of the neighbors of the airport or supply the relief requested." (Italics added.)

So in this case, the efforts in this regard of the FAA Chief of the Airport Traffic Control Tower at the Hollywood-Burbank Airport were likewise unsuccessful (A. 317, 319). As in the case of the Santa Monica Airport, the only feasible means of satisfying the "needs" of those who resided in the vicinity of the Hollywood-Burbank Airport was to impose the time restrictions on jet aircraft takeoffs as specified in the Burbank

⁶¹*Id.* at pp. 6-7.

⁶²*Id.* at p. 7.

⁶³*Id.* at p. 7.

ordinance (which conformed to those specified in the Santa Monica ordinance). If the power to impose such restrictions resides in the Federal Aviation Administrator, it remained "dormant and unexercised."⁸⁴

Accordingly, at least until the Administrator acts, Burbank has the power to impose such restrictions.

On this point *Head v. Board of Examiners, supra*,⁸⁵ has further relevance. Before the Court in that case was the Constitutional validity of a statute of the State of New Mexico which prohibited certain price advertising methods in the sale of glasses over radio stations and in newspapers which also served the adjoining State of Texas. At issue, among others, was whether the statute was preempted by the Federal Communications Act. It appears from the opinion and the concurring opinion that at one time the Federal Communications Commission had intensively regulated the field of false, misleading or deceptive advertising designed for radio and television broadcast, but that since World War II it had largely left these matters in the hands of the Federal Trade Commission. In holding that the New Mexico statute had not been preempted, this Court stated (374 U.S. at p. 432):

"As in *Colorado Anti-Discrimination Com. v. Continental Air Lines, Inc.* 372 US 714, at 724, 10 L ed 2d 84, 91, 83 S Ct 1022, we are satisfied that the state statute 'at least so long as any power the [Commission] may have remains "dormant and unexercised," will not frustrate any part of the purpose of the federal legislation.'"

⁸⁴*Colorado Anti-Discrimination Com. v. Continental Airlines, Inc.*, 372 U.S. 714 (1963) at p. 724.

⁸⁵374 U.S. 424 (1963).

In *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), the very issue was whether the City of Detroit by ordinance would require boilers, which had been approved and licensed by the Federal Government for use on navigable waters, to be replaced by other equipment in order to relieve that City from the effects of air pollution. In holding that it could and that the ordinance was not preempted by Federal legislation, this Court first observed as follows (362 U.S. at page 442):

"The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government."

It then pointed out that Congress had for many years maintained an extensive and comprehensive set of controls over ships and shipping, including the inspection of steam vessels, and that these inspections were broad in nature, including, among other things, boilers. It continued as follows (362 U.S. at pages 445 and 446):

"The thrust of the federal inspection laws is clearly limited to affording protection from the perils of maritime navigation."

* * *

"By contrast, the sole aim of the Detroit ordinance is the elimination of air pollution to protect

the health and enhance the cleanliness of the local community.”

* * *

“We conclude that there is no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance here involved. For this reason we cannot find that the federal inspection legislation has pre-empted local action. To hold otherwise would be to ignore the teaching of this Court’s decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists.”

Totally apart from this view of the matter is the fact that Congress, in adding Section 611 to the Federal Aviation Act of 1958 (49 U.S.C. §1431), left airport proprietors unregulated insofar as the determination of the permissible level of noise that could be created by aircraft using their airports and, as already indicated, the discretion of airport proprietors in that regard has been repeatedly affirmed by the Federal Aviation Administrator.²² This, in and of itself, is sufficient to validate the Burbank ordinance. Thus in *Rice v. Board of Trade*, 331 U.S. 247 (1947), companion cases to *Rice v. Santa Fe Elevator Corp.*, *supra*, the issue before the Court was whether Congress by enacting the Commodity Exchange Act, 49 Stat. 1491, c. 545, had preempted the ability of the Illinois Commerce Commission to regulate the Chicago Board of Trade, a commodity exchange. In holding that the Illinois Commerce Commission had the power to regulate the Chicago Board of Trade in those areas where

²²*Supra*, footnote 2.

that Board had freedom to act, this Court stated (331 U.S. at page 254):

"Insofar as those rules are concerned, all that the Act and the regulations of the Secretary do is to define the area in which the Board may provide standards for warehouses whose receipts are acceptable in satisfaction of futures contracts. By the terms of §5a(7) the requirements fixed by the Board must be 'reasonable' and they must relate to 'location, accessibility, and suitability for warehousing and delivery purposes.' If the Board transcends those bounds, it violates the Act. See §6b. But within that area it has considerable discretion.

"Hence it seems to us that no action of the Illinois Commission within the zone where the Board has freedom to act would contravene the federal scheme of regulation. It would be quite a different matter if the Illinois Commission adopted rules for the Board which either violated the standards of the Act or collided with rules of the Secretary. But such collision is not necessary; and we cannot assume that the Illinois Commission will take any action which in any way impairs the federal regulatory scheme." (Italics added.)

Since Lockheed had the freedom and discretion to take the action necessary to exclude aircraft on the basis of these considerations, the City of Burbank, under the foregoing decision, had the power to require Lockheed to exercise this discretion in the manner as set forth in the ordinance.

The comments of the California Supreme Court in *Loma Portal Civic Club v. American Airlines, Inc.*, *supra*,⁶⁷ on the effect of a holding of Federal preemption are worth repeating. In that regard the Court stated (61 Cal. 2d at pages 591-592, 39 Cal. Rptr. at page 714, 394 P. 2d at page 554):

"A holding of federal preemption would have the effect of disabling the state from any action in the entire field, and placing in the federal government complete and sole responsibility for regulation of all aspects of that field. Such a holding by a single state court would have, of course, no effect on the conduct of other states with respect to regulation of that field, and unless Congress had in fact intended such preclusion of state regulation and were to carry out its responsibilities, there would result within that state a lacuna which the state would be powerless to fill."

In this case we have a "lacuna" which the Burbank ordinance has attempted to fill.

3. The Conflict Issue.

The Court of Appeals resolved the conflict issue against the Appellants by concluding that the Burbank ordinance "stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress," citing *Perez v. Campbell*, 402 U.S. 637 (1971). The conflict which it found was with respect to a *non-mandatory* runway preference order of a minor FAA official in charge of the Air Traffic Control Tower at Hollywood-Burbank Airport (A. 426). By a

⁶⁷61 Cal. 2d 582, 39 Cal. Rptr. 708, 394 P. 2d 549 (1964).

footnote reference it is also stated that the Burbank ordinance terminated "the right of flight of prospective passengers" for the PSA 11:30 p.m. Sunday night flight "through this portion [Hollywood-Burbank Airport] of the airspace at this time" (A. 427, fn. 12). On the other hand the District Court appears not to have specifically considered the conflict issue in its opinion, but any deficiency in this regard was remedied by the Plaintiffs (Appellees here) by including in the Conclusions of Law two areas of alleged conflict, namely, (1) interference with Federally certificated rights,¹⁶ and (2) interference with the use of the navigable airspace.¹⁷ Each of these alleged conflicts will now be separately considered.

Runway Preference Order.

With respect to the non-mandatory runway preference order considered by the Court of Appeals (BUR 7100.5B),¹⁸ it must be first observed that it was a procedural regulation for the guidance of those who desired to enter the navigable airspace, and was in no sense a restriction imposed by the Federal Aviation Administrator on Lockheed, the proprietor and operator of the Hollywood-Burbank Airport. Neither was it a regulation by the Federal Aviation Administrator of the type contemplated by Section 611 (49 U.S.C. §1431) of the Federal Aviation Act of 1958. It was presumably issued under the authority of FAA order 7100.13.¹⁹ There was obviously no conflict between it and the Burbank ordinance. Nevertheless the Court of Appeals seized upon that portion of this procedural order

¹⁶Conclusion of Law No. 17 (A. 404-405).

¹⁷Conclusion of Law No. 18 (A. 405).

¹⁸Pl. Ex. 30 (A. 453-455).

¹⁹Pl. Finding of Fact No. 56 (A. 392).

which stated that the "procedures . . . are designed to reduce the community exposure to noise to the lowest practicable minimum", and then went on to state that "This assertion represents a considered determination by an authorized representative of the FAA that measures of the magnitude of that taken by the City of Burbank are beneath 'the lowest practicable minimum'." A complete answer to this assertion is found in our discussion of the Preemption Issue under the hearings "National Uniformity" and "The Burbank Ordinance is Not Preempted", wherein we pointed out that this so-called "determination" was in conflict with the determination of the Federal Aviation Administrator in the *Dreifus* matter, namely, that when noise abatement and other procedural regulations had failed to provide needed relief, "further relief *should involve* airport use restrictions similar to those" imposed by the Santa Monica ordinance.¹² In making this statement the Administrator observed that, as the proprietor of the Washington National Airport he had imposed restrictions on its use."

Time limitations, however, are not the only approved method of reducing the effects of aircraft noise. There was yet another measure available to reduce the community exposure to noise below this "lowest practicable minimum", namely, the exclusion of aircraft from Hollywood-Burbank Airport on the basis of noise considerations. This likewise had the specific approval of the Federal Aviation Administrator in *Dreifus*¹⁴ and had earlier been asserted as a means of alleviating the adverse effects of aircraft noise-by the

¹²Appendix to this Brief at p. 7. See also *infra*, footnote 81.

¹³*Id.* at pp. 5, 12.

¹⁴*Id.* at p. 11.

Secretary of Transportation.⁷⁸ It should be noted that the nonmandatory runway preference order on which the Court of Appeals relied was issued September 4, 1969.⁷⁹ The *Dreifus* opinion was issued July 10, 1969.⁸⁰

In view of the foregoing, the only weight that can be properly accorded to the FAA Tower Chief's determination is that of all *noise abatement runway procedures* he had attempted,⁸¹ this last one had the best prospects of achieving the greatest reduction of noise.

Interference With Federally Certificated Rights.

In an attempt to overcome the absence of any evidence of conflict with any Federal statute or regulation, the argument was advanced in the District Court and carried over into Conclusion of Law No. 17 (A. 404-405) that the Burbank ordinance somehow conflicted with Certificates of Public Convenience and Necessity held by the interstate carriers utilizing the Hollywood-Burbank Airport. That this argument has no merit is easily demonstrated. Under Section 401 of the Federal Aviation Act of 1958 (49 U.S.C. §1371) the Civil Aeronautics Board is empowered to issue Certificates of Public Convenience and Necessity *authorizing* interstate air carriers to engage in air transportation, and Certificates of Public Convenience and Necessity are issued in that form, *e.g.*, "Hughes Air Corp. is

⁷⁸Id. at pp. 1-2.

⁷⁹PL Ex. 30 (A. 453).

⁸⁰Appendix to this Brief at p. 13.

⁸¹The FAA Chief of the Traffic Control Tower at Hollywood-Burbank Airport had tried three other and different noise abatement runway procedures: BUR 7100.5A, dated August 18, 1968 (A. 556-557); BUR 7100.5, dated April 23, 1968, (A. 458-459); and BUR 7100.3 dated Dec. 7, 1967 (A. 460-461).

hereby authorized . . .” [Pl. Ex. 8, A. 104]. Under Subsection (i) of Section 401 of the Federal Aviation Act of 1958 (49 U.S.C. §1371(i)) a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board does not “confer any proprietary, property, or exclusive right in the use of any airspace, Federal airway, *landing area*, or air-navigational facility” (Italics added). The Civil Aeronautics Board itself has recently recognized the limitations imposed by this subsection in its decision in Pacific Northwest-California Investigation, Docket 18884 of May 12, 1970 [Pl. Ex. 35, A. 118] when it granted to Continental Air Lines, Inc. a route which involved the use of Ontario International, Long Beach Municipal, Hollywood-Burbank and Orange County Airports. As appears from its decision, the City of Long Beach and the County of Orange were unwilling to allow Continental to use their airport facilities and, in that connection, the Civil Aeronautics Board stated at page 13:

“Since cooperation of the local airport authorities will be needed before any service can be inaugurated, it will be up to the satellite carrier [Continental Air Lines, Inc.] we have selected to convince these authorities that their express fears are exaggerated or are outweighed by affirmative considerations.”

At the time of trial in this case Continental had been unsuccessful in persuading these local airport authorities to accept their aircraft and as a consequence it was not providing any service to or from these particular airports (A. 239-242).

Interference With Use of the Navigable Airspace.

The Burbank ordinance, of course, does not pretend to reach into the navigable airspace and control the flight of aircraft, as was attempted by the towns of Hempstead, Cedarhurst and Audubon Park.⁷⁹ Instead, it operates in an area not committed to Federal control. It operates against an airport proprietor who has failed to obtain air and noise easements necessary for the operation of the airport, and who has the power, without violating any Federal statute or regulation, to exclude aircraft on the basis of noise considerations.⁸⁰

Admittedly it precludes entry into the navigable airspace from the Hollywood-Burbank Airport between the hours of 11:00 p.m. and 7:00 a.m. except in emergencies. That there is nothing unusual or unreasonable about this is attested by the fact that the Federal Aviation Administration, as proprietor of the Washington National Airport, has imposed more drastic restrictions on the use of that airport during the late evening and early morning hours⁸¹ and, as already noted, the Federal Aviation Administrator himself has declared that this form of locally responsive noise control "is clearly in the national interest" and is not incompat-

⁷⁹See cases cited in footnote 48, *supra*.

⁸⁰See footnote 2, *supra*.

⁸¹See *Virginians for Dulles v. Volpe*, 344 F. Supp. 573 (1972) at p. 576; *In re Dreifus*, Appendix to this Brief at pp. 5, 12. At the time the House of Representatives was considering legislation which later became the Noise Control Act of 1972, Congressman Mikva had this to say: "One of the few successful attempts at regulation has been the ban on late evening and pre-dawn jet traffic at Washington National Airport. I strongly urge other airports to follow this example. It is morally, socially, and environmentally necessary." 118 Cong. Rec. (daily ed., 1972) No. 29, at p. H 1534.

ible with the primary reason for the Federal Aviation Act of 1958.²²

The action of the Council of the City of Burbank, in enacting the ordinance in question, clearly accords with and implements the policy of Congress as expressed in its more recent legislative enactments, (e.g., The National Environmental Policy Act, 42 U.S.C. §4321; Environmental Education Act, 20 U.S.C. §1531; Air Quality Act of 1967, 42 U.S.C. §1857 *et seq.*; Environmental Quality Improvement Act of 1970, 42 U.S.C. §§4372-4374).

Of importance for the purposes of this discussion are the observations of the California Supreme Court in *Loma Portal Civic Club v. American Airlines, Inc.* (1964), 61 Cal. 2d 582, 592, 39 Cal. Rptr. 708, 714, 394 P. 2d 548, 554:

"Moreover, we note that noise abatement is a federal as well as a state aim, and when not inconsistent with safety . . . would not necessarily present a conflict with federal law but might well reinforce it."

The Court of Appeals, in its statement that the effect of the Burbank ordinance "was to terminate the right of flight of prospective passengers [approximately 80] *through* this portion of the airspace at this time," was obviously attempting to bring its prohibition within the language of Section 104 (49 U.S.C. §1304) of the Federal Aviation Act of 1958 which declares "a public right of freedom of *transit through* the navigable airspace of the United States" (*Italics added*). In actuality the ordinance did not deny freedom of transit through

²²Appendix to this Brief at pp. 11-12.

the navigable airspace. What it did was prohibit entry into the navigable airspace from the land on which the Hollywood-Burbank Airport is located during the proscribed hours. While this difference may seem small, it is significant.

There is nothing in the Federal Aviation Act of 1958 which confers on the public or anyone else the right to enter the navigable airspace from land where such entry has been prohibited by an ordinance or land use regulation adopted by a municipality. It is well settled in California that, in the exercise of its police power, a municipality may enact ordinances the object of which is to abate or prevent nuisances caused by businesses located within its boundaries. *Thain v. City of Palo Alto*, 207 Cal. App. 2d 173, 24 Cal. Rptr. 515, 523 (1962) [Hearing denied by Supreme Court]; *Boyd v. City of Sierra Madre*, 41 Cal. App. 520, 183 Pac. 230, 232 (1919). It is also well settled that municipalities may enact land use regulations which have the same objective. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Furthermore, Congress has not ordained that every airport, no matter what its limitations may be, must remain open 24 hours a day³³ and must be available for

³³The Hollywood-Burbank Airport could hardly be classified as a "24-hour" airport. Between the hours of 11:00 p.m. and 7:00 a.m. it is essentially a general aviation airport insofar as take-offs are concerned since the only scheduled departure during that period of time was the PSA 11:30 p.m. Sunday night flight. When weather conditions at Los Angeles International Airport prevent its use and United Air Lines planes land at Hollywood-Burbank Airport after midnight, they do so under an understanding with Lockheed that they will not take off until after 7:00 a.m. Apparently this is because Lockheed is unable to handle these aircraft during that period insofar as take-offs are concerned (A. 171-172). This understanding has been in effect for 15 or 20 years (A. 173).

use by every type of aircraft, no matter what the effect may be on those who reside in the surrounding area.

To elevate the possible convenience of 80 persons departing from the Hollywood-Burbank Airport for San Diego once a week on a Sunday night at 11:30 p.m. to a point of constitutional significance, is to us a perversion of this Court's teachings in *Perez* (402 U.S. 637) and other decisions. The same may be said of the non-mandatory runway preference order. It is clear from the *Perez* decision that if the majority of this Court had been convinced that the Arizona statute would serve to promote the health, safety or welfare of the citizens of Arizona, the constitutionality of the statute would have been sustained. The same observation is applicable to *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) and *Bibb v. Navajo Freight Lines Inc.*, 359 U.S. 520 (1959).

Magnifying the possible convenience of these 80 persons and disregarding the need of thousands of persons who reside in the vicinity of Hollywood-Burbank Airport for uninterrupted sleep on a Sunday night prior to a Monday morning, does not comport with a proper approach in weighing the validity of the Burbank ordinance.

That the ordinance was reasonable and necessary is attested by the fact that the Due Process issue (XI Amendment) was withdrawn by the Plaintiffs from the District Court's consideration (A. 66-67), and further statements made by the counsel for the plaintiffs during the course of the trial [R. Tr. pp. 437-438]. The need and necessity for providing some relief for those who reside in the vicinity of Hollywood-Burbank Airport is further demonstrated by the fact that in the area immediately south of the "North-South" runway the popu-

lation has decreased by 11.1% since 1960⁸⁴ and in the area immediately to the east of that area by 15.7%.⁸⁵ As to the area immediately to the east of the "East-West" runway, the population has decreased since 1960 by 7.4%.⁸⁶ All of the areas referred to are within the City of Burbank and subject to noise levels in excess of 100 plus PNdb.⁸⁷ This indicates that those who have been able to move from these areas have done so. The rest, presumably unable to do so, continue to remain subject to the severe noise pollution created by operations at the Hollywood-Burbank Airport. The only real relief that these residents have had is that provided by the Burbank ordinance during the short period of time that it remained in effect prior to the issuance of the restraining order and during the period from July 13 to November 30, 1970, as a result of Lockheed and PSA withdrawing their application for a preliminary injunction. It is worthy of note that the Federal Aviation Administration could have provided this needed relief, not by regulation of the airport proprietor (Lockheed), but through operational regulations imposed upon the aircraft which it controls. Instead, it chose to join with the ATA in seeking the invalidation of the Burbank ordinance.⁸⁸

⁸⁴U. S. Census, Burbank Code Area 3111: 1960 population, 4,286; 1970 population, 4,012.

⁸⁵U. S. Census, Burbank Code Area 3110: 1960 population, 4,527; 1970 population, 3,650.

⁸⁶U. S. Census, Burbank Code Area 3105: 1960 population, 3,363; 1970 population, 3,117.

⁸⁷Branch and Beland, *Outdoor Noise and the Metropolitan Environment—Case Study of Los Angeles with Special Reference to Aircraft*, 1970 (Library of Congress Catalog Card No. 72-126027), at p. 21.

⁸⁸See footnote 8, *supra*. The Court of Appeals made no specific mention of corporate jet aircraft, other than to note that such

(This footnote is continued on next page)

4. Burden on Interstate Commerce.

Although the Court of Appeals declined to consider the issue as to whether the Burbank ordinance constituted an unreasonable burden on interstate commerce, the District Court concluded that it did. This conclusion was reached, not because the ordinance did in fact burden interstate commerce, since it only affected one regularly scheduled intrastate flight and flights of corporate jet aircraft, but rather on the basis of ATA's contention that the ordinance had to be viewed as if it were adopted by all major airports within the United States. A similar approach was attempted by the airlines in the recent case of *Evansville-Vanderburgh Airport Authority District of Delta Airlines, Inc.*, 405 U.S. 707 (1972). There the airlines contended, as to the per

aircraft were likewise prevented from taking off during the prescribed hours. There is no evidence that this caused any hardship. In *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 Atl.Rptr.2d 692 (1969), the Court stated in part as follows (261 Atl. Rptr. 692, at pp. 701, 706):

"At Morristown Airport the offensive engine noises for the most part are not emitted by airplanes serving the general public, but by the jets of the few corporate executives who own or charter the aircraft which noisily ride the invisible highway as an industrial status symbol. (See: *Harley, Jr.*, TC, OCH Dec. 29, 803 [M], ¶7703 [M] [1969]). If not simply a symbol it is argued that time and energy of the corporate officer and employee is saved. The importance of the speed of travel to the corporate executive must be placed on one side of the scale and balanced against the domestic tranquility to which family and the neighborhood are entitled."

• • •

"Most intrusive is the noise from corporate jets. If these are truly used for business, why should not the hour of landing and take-off be limited to normal, reasonable business hours? The corporate executive's desire for early departure and late returns may have to be sacrificed in the interest of a good night's rest for the residents. He may have to leave a day earlier or return a day later. His absence for a few hours more or less will not send his corporation into bankruptcy."

capita charges imposed on airline passengers by State airport proprietors, that "If such levies were imposed by each airport along a traveller's route, the total effect on the cost of air transportation, could be prohibitive, the competitive structure of air carriers could be affected, and air transportation, compared to other forms of transportation, could be seriously impaired" (405 U.S. at page 721). In rejecting this contention and concluding that these charges were constitutionally permissible, this Court stated (405 U.S., at page 722):

"But there is no suggestion that the Indiana and New Hampshire charges do not in fact advance the constitutionally permissible objective of having interstate commerce bear a fair share of the costs to the States of airports constructed and maintained for the purpose of aiding interstate air travel. In that circumstance, '[a]t least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State[s].' *Freeman v. Hewit*, 329 US, at 253, 91 L Ed at 272; see also *Southern Pacific Co. v. Arizona*, 325 US 761, 775-776, 89 L Ed 1915, 1928, 65 S Ct 1515 (1945)."

We should note here parenthetically that the airlines and the passengers which utilize the Hollywood-Burbank Airport are not bearing their "fair share" of the cost of their use of this airport. It is the owners of property and residents under the necessary approachways and departure paths of that airport who bear a substantial cost of its operation. Not only are the airlines and their passengers enjoying a "free ride" at the expense of these owners and residents, but so is Lockheed and the Federal government.

Effect of the Burbank Ordinance.

There is no evidence in this case that the enforcement of the ordinance has imposed or would impose any burden on interstate commerce. The burden, of course, was upon Lockheed, PSA and ATA to show that enforcement of the ordinance operated to prejudice interstate commerce (*Interstate Busses Corp. v. Holyoke Street R. Co.*, 273 U.S. 45 (1927) at p. 51). In enacting the ordinance the Council of the City of Burbank was fulfilling the duty imposed on it "to protect the well-being and tranquility" of the City (See *Breard v. Alexandria*, 341 U.S. 622 (1951) at p. 640).

The case of *Huron Portland Cement Co. v. Detroit*, *supra*, (362 U.S. 440), discussed in connection with the preemption issue, is equally pertinent to this issue. The following excerpts from the Court's opinion are relevant (362 U.S. at pp. 447-448):

"The mere possession of a federal license, however, does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce."

* * *

"... the Detroit ordinance requires no more than compliance with an orderly and reasonable scheme of community regulation. The ordinance does not exclude a licensed vessel from the Port of Detroit, nor does it destroy the right of free passage. We cannot hold that the local regulation so burdens the federal license as to be constitutionally invalid."

Huron cannot be viewed as an isolated declaration of law outside of the mainstream of this Court's teachings as to what constitutes an unlawful burden on

interstate commerce. It is the cornerstone of the decision in *Head v. Board of Examiners, supra* (374 U.S. 424), which, as we have previously observed, sustained a statute of the State of New Mexico forbidding certain price advertising methods in the sale of glasses over radio stations and in newspapers which also served the adjoining State of Texas. In so holding, the Court stated (374 U.S. at pages 428-429):

"Like the smoke abatement ordinance in the Huron case, the statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power. The legitimacy of state legislation in this precise area has been expressly established. *Williamson v. Lee Optical of Okla., Inc.* 348 US 483, 99 L. ed 563, 75 S Ct 461. A state law may not be struck down on the mere showing that its administration affects interstate commerce in some way. 'State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand.' *Huron Portland Cement Co. v. Detroit, supra* (362 US at 448).

"It has not been suggested that the statute, applicable alike to 'any person' within the State of New Mexico, discriminates against interstate commerce as such. Nor can we find that the legislation impinges upon an area of interstate commerce which by its nature requires uniformity of regulation. The appellants have pointed to no regulations of other States imposing conflicting duties, nor can we readily imagine any. Colorado Anti-

Discrimination Com. v. Continental Air Lines, Inc., 372 US 714, 10 L ed 2d 84, 83 S Ct 1022. We hold that the New Mexico statute, as applied here to prevent the publication in New Mexico of the proscribed price advertising, does not impose a constitutionally prohibited burden upon interstate commerce."

The Burbank ordinance, like the New Mexico statute, controls the *proprietor* of a business located within its boundaries. Conflict with regulations imposed by other cities or airport proprietors cannot be readily imagined.

The fears expressed by ATA's witnesses, that if the Burbank ordinance is sustained it will lead to a proliferation of similar restrictions throughout the country, find no basis in fact. States and elements of local government who, for the most part, own and operate our Nation's airports have always had the power to deny the use of their airports to aircraft on the basis of noise considerations,² and there is no evidence that this power has been indiscriminately or unreasonably exercised. There will be time enough for this Court, or other courts having jurisdiction, to consider the reasonableness of any regulations imposed by other local authorities or States on airport operations, when and if such occurs. The "possibilities of conflict and repugnancy" which ATA has "conjured up", by contending that the Burbank ordinance should be viewed in the aspect as if applied to all major airports throughout the United States, is purely an attempt to cloud the issue (See *Rice v. Santa Fe Elevator Corp.*, *supra*, 331 U.S. at page 237).

²Footnote 2, *supra*.

Need for Single Authority.

The District Court, in its consideration of the interstate commerce issue, concluded, from the evidence presented as to the effect of a nationwide curfew, "that air commerce, by reason of its speed and volume, requires a single authority in control if it is to be conducted at maximum safety and efficient use of the navigable air space."¹⁰⁰

We have already demonstrated the falsity of the premise on which this conclusion was based. We have further demonstrated the undesirability, if not the impossibility, of applying uniform rules for airports in the area of noise abatement.

Further discussion is therefore unnecessary except to point out that, under at least one decision of this Court, the extent to which commerce requires a single authority in control has been determined to be a *legislative question*, not a judicial question. Thus in *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938) the Court stated (303 U.S. at pages 189-190):

"Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. *But that is a legislative not a judicial function*, to be performed in the light of the Congressional judgment of what is appro-

¹⁰⁰A. 368. See also Finding of Fact No. 83 (A. 401) and Conclusion of Law No. 19 (A. 405).

prate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought." (*Italics added.*)

Up to the present time Congress has not seen fit to place airports utilized by air commerce under the control of any Federal agency, and, as previously observed, airport proprietors are not subject to Federal economic or other regulation except in the area of airport *safety*.⁹¹

5. Violation of Fifth, Ninth and Tenth Amendment Rights.

One of the points which Appellants stressed in their argument before the Court of Appeals was that a decision holding Burbank powerless to enact and enforce the ordinance in question would allow private airport proprietors, such as Lockheed, to ride roughshod over the rights of owners of property surrounding airports in violation of constitutional guarantees. This is exactly what has occurred and is occurring since the District Court rendered its decision.

If the activities and conduct of the Federal Aviation Administration and the United States in connection with the Hollywood-Burbank Airport are sufficient to con-

⁹¹Footnote 9, *supra*.

stitute Federal action," then the Fifth Amendment would apply. An action for damages can hardly be considered a substitute for that portion of the Fifth Amendment which guarantees that no person shall "... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." Those who live in the vicinity of Hollywood-Burbank Airport are daily being deprived of a chance to enjoy a life free from constant bombardment by sound waves. Their liberty and the use of their property are severely restricted by the adverse environment imposed on them by a private corporation for private gain and without just compensation having been paid." Surely this is an area in which a municipality or a State may reasonably legislate, as they have in the area of life, liberty or property taken by direct physical force. The Commerce Clause cannot shield those who invade Fifth Amendment rights, and legislation, such as the Burbank ordinance, which seeks in some degree to preserve such rights until due process

"Approximately 2,050 feet of the northernmost portion of the "North-South" runway and approximately 2,250 feet of the westernmost portion of the "East-West" runway are on land owned by the United States Government (A. 380-381); the FAA has expended approximately \$2,000,000 on the installation of navigational aids at Hollywood-Burbank Airport including the Instrument Landing System ("ILS"), runway approach and identification lights, and radar and radio equipment, and operates the Airport Traffic Control Tower and Radar Approach and Departure Control at that airport (A. 385); the FAA has included Hollywood-Burbank Airport in the National Airport Plan [Pl. Ex. 56] in spite of the fact that Congress had specifically directed that such Plan was to embrace airports owned and operated by States and local public agencies (49 U.S.C. §1101, 11102.)

"The California Supreme Court has recently recognized that more is involved than the mere "taking" of property, in holding that an action grounded on public nuisance will lie. *See People v. City of Santa Monica*, 6 Cal. 3d 920, 101 Cal. 468, 496 P. 2d 480 (1972).

is satisfied and just compensation paid, must be upheld if that Amendment is to have any real meaning.

These arguments are not without support in decisions of this Court. In *Bell v. Burson*, 402 U.S. 535 (1971), this Court held that *before* a person's driving privileges could be terminated because of involvement in an accident, the Due Process Clause of the Fourteenth Amendment requires that a hearing be provided for the determination of whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident. In *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969), it was likewise held that *before* a person's property could be taken under a prejudgment garnishment, the Due Process Clause of the Fourteenth Amendment required notice and a hearing. To the same effect is *Fuentes v. Shevin*, 407 U.S. 67 (1972). The following excerpts from that opinion are particularly pertinent (407 U.S. at pages 81-82):

"... the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference."

* * *

"But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not ... embraced the general proposition that a wrong may be done if it can be undone.' [Citation.]

"This is no new principle of constitutional law. The right to a prior hearing has long been recog-

nized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the form of a hearing 'appropriate to the nature of the case,' [Citation] and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any],' [Citation] the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect."

It is a logical extension of these decisions that *before* a person may be deprived of the use and enjoyment of his property, just compensation must be paid or, at the very least, deposited in court.

We pause to note that there appear to be broader implications when the Fifth Amendment is considered with the Fourth Amendment. Thus in *Olmstead v. United States*, 277 U.S. 438 (1928), it is stated (277 U.S. at page 478):

"The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

If the Fifth Amendment is not applicable, there is a respectable body of opinion that the right to a decent environment is one of the rights retained by the people under the Ninth and Tenth Amendments, and that action which leads to the destruction of the environment may be restrained or limited.²⁴ Apart from this, it would appear to be beyond question that one of the rights retained by the people under the Ninth and Tenth Amendments was the right to restrain private persons and corporations who would seek to interfere with their lives and liberty or take their property without first paying just compensation. Under either of these propositions the Burbank ordinance is such a restraint,

²⁴Roberts, *An Environmental Lawyer Urges: Plead The Ninth Amendment*, *Natural History*, 26 (Aug.-Sept. 1970); Redlich, *Are There Certain Rights . . . Retained by the People?* 37 N.Y.U. L.Rev. 786 (1962); Beckman, *The Right to a Decent Environment Under the Ninth Amendment*, 46 Los Angeles Bar Bulletin 415 (Sept. 1971); See also *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 728 (1971), which involved an attempt to enjoin the construction of a dam by the United States Army Corps of Engineers, the District judge had this to say regarding the claim for relief under the Fifth and Ninth Amendments (325 F. Supp. at p. 739):

"Those who would attempt to protect the environment through the courts are striving mightily to carve out a mandate from the existing provisions of our Constitution. Others have proposed amendments to our Constitution for this purpose. See *Toward Constitutional Recognition of the Environment*, 36 A.B.A.J. 1061 (Nov. 1970). Such claims, even under our present Constitution, are not fanciful and may, indeed, some day, in one way or another, obtain judicial recognition. But, as stated by Judge Learned Hand in *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809 (2 Cir. 1944):

"Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant."
"The Ninth Amendment may well be as important in the development of constitutional law during the remainder of this century as the Fourteenth Amendment has been since the beginning of the century."

having been enacted by a legislative body duly elected by the People of the City of Burbank.

6. *Griggs v. Allegheny County.*

We have reserved the case of *Griggs v. Allegheny County*, 369 U.S. 84 (1962) for separate discussion because of what we consider to be inconsistencies between the decisions of the District Court and the Court of Appeals and the position taken by this Court in that case. In holding the airport proprietor liable for the "taking" of an air easement over the petitioner's property, and in effect excluding the Federal government and the airlines from any responsibility in that connection, this Court gave no weight to Subdivision (24) of Section 101 (49 U.S.C. §1301) of the Federal Aviation Act of 1958 under which Congress had redefined the "navigable airspace" to "include airspace needed to insure safety in take-off and landing of aircraft," nor to Section 104 (49 U.S.C. §1304) of that Act, *supra*, relied upon by the Court of Appeals. The fact that the CAA had approved the general design of the airport, that Federal funds were used in its construction, that every landing and take-off from the airport was at all times under the direct signal and supervisory control of some Federal agent and that the contribution of the Federal government was a part of its National Airport Plan to induce localities, such as Allegheny County, to assist in setting up a national and international air-transportation system, were likewise accorded no weight. The *Griggs* decision seemingly took the view that airports and airport proprietors were outside of the scope of Federal control and that it is the airport proprietor who makes the necessary determinations as to where the airport should be built, the length

of its runways, and other features which would affect the type and size of the aircraft which may utilize its facilities. We certainly do not dispute the validity of this conclusion, but what we stated before the Court of Appeals has equal validity here, to wit:

"*Griggs* and the decision of the District Court in this case cannot stand together. If the FAA has the power over airports which it and the Appellees contend it has, then *Griggs* must be overruled. If such should ever occur, there will be at least one good result, namely, the Federal Government and the airlines will no longer be able to avoid liability for the destruction and damage caused by an airport, such as Hollywood-Burbank Airport, which has neither provided nor acquired adequate approachways to its facilities."

We say again that if Congress has in fact preempted the field of regulation of noise created by jet aircraft to the exclusion of States and local governments, as the opinion of the Court of Appeals in this case holds, then the decision in *Griggs* must be reconsidered, something only this Court can do. With power should go responsibility. If the decision in this case is allowed to stand without reversal of *Griggs*, then the Federal Aviation Administration will be able to continue its questionable course of conduct without interference, and the Federal government and the airlines will remain shielded from liability for their actions or non-action."

¹⁰⁰See Lesser, *The Aircraft Noise Problem: Federal Power But Local Liability*, 3 Urban Lawyer 175 (1971). Mr. Lesser

While we recognize that liability for a "taking" of air or noise easements necessary for the operation of the Hollywood-Burbank Airport is not directly at issue in this case, neither was the liability of the Federal Government or the airlines for such a "taking" directly at issue in the *Griggs* case. Nevertheless, on the strength of the *Griggs* decision, there has been no attempt to our knowledge to impose liability for such a taking on the Federal government except in cases where the Federal government is the owner and operator of the airport. If in fact the Federal government by virtue of legislation or exercise of power has preempted the ability of States and local governments to exercise reasonable control over airports within their boundaries, in terms of aircraft noise abatement, then we feel that the Court should take this opportunity to reverse *Griggs* to the extent indicated. Noise pollution by jet aircraft is too serious a matter to allow for the time it takes a decision to reach this Court, should someone have the time, energy, money and fortitude to weather adverse decisions of the lower Federal courts and finally reach this Court.

who was at that time Chief, Opinions and Appeals Division of the Port of New York Authority, has this to say regarding the effect of *Griggs*:

"Because *Griggs* failed to place the financial burden of aircraft noise on either the airlines or the Federal Government, neither had any direct economic inducement to assign to noise suppression the high priority it required in aircraft development—a rank co-equal to that of safety.

"It is hard to escape the conclusion that if Justice Black's dissenting opinion had been the 'Opinion of the Court' the noise problem would not have reached its present dimensions." (*Id.* at p. 202).

7. The Solution.

There are few who would not agree that complete relief from the adverse effects of noise pollution caused by jet aircraft will only come when the noise from jet engines is reduced to liveable levels. As has already been demonstrated to a degree, the prospects of this are indeed remote. It will be our purpose here to review the means and measures available for the solution of this problem, as a fitting introduction to the last phase of this argument in which we contend that if the safety, health and welfare of the People of these United States is to be preserved, States, local governments and the Courts must be released from the strait-jacket of the preemption and conflict doctrines which have been gradually extended in their scope and effect since *Gibbons v. Ogden*, 9 Wheat. 1 (1824). We will attempt to demonstrate the imperative necessity for this Court's reconsideration of these doctrines in light of the situation as it exists in this country today and how it will be in the future if this Court should fail to intervene. There can be no dispute that such a review and reconsideration are well within the issues involved in this case.

Relief at the Federal Level.

Much has already been said regarding the posture and inaction of the Federal Aviation Administration in the area of abatement of jet aircraft noise, and it need not be repeated here. Reference has likewise been made to the apparent impossibility of persuading the Congress to shift the responsibility for the abatement of aircraft noise to another Federal agency less subject to domination by the airlines. While we have the National Environmental Policy Act⁴² and the Environment Quality In-

⁴²42 U.S.C. §4321, *et seq.*

provement Act of—1970,⁹⁷ these Acts provide no present relief from existing noise jet aircraft pollution. Even with respect to new projects which may have an adverse effect on the environment, it has been necessary for this Court⁹⁸ and other courts⁹⁹ to compel the Federal agencies concerned to give proper consideration to the environmental impact of proposed actions in accordance with the provisions of the applicable statute.

Although this Court has, even without the benefit of specific legislation by Congress, intervened to protect the environment,¹⁰⁰ there is no indication yet that it will implement the broad policy statements in these Acts by upholding State and local governmental regulations in this field. The California Supreme Court has recently¹⁰¹ taken the State Legislature at its word and utilized similar broad statements of environmental policy contained in the California Environmental Quality Act of 1970¹⁰² to extend the requirement of an environmental impact report to private projects, even

⁹⁷42 U.S.C. §§4371-4374. In this Act it is declared that "The primary responsibility for implementing this policy rests with State and local governments" (Section 202(b)(2); 42 U.S.C. §4371(b)(2)).

⁹⁸*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

⁹⁹*Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F. 2d 1109 (D.C. Cir. 1971). There the Court stated (at p. 1111):

"Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."

¹⁰⁰*New Jersey v. New York*, 283 U.S. 336 (1931); *Udall v. Federal Power Commission*, 387 U.S. 428 (1967).

¹⁰¹*Friends of Mammoth v. Board of Supervisors of Mono County*, November 6, 1972, Sacramento 7924. This case has not yet been officially reported.

¹⁰²California Public Resources Code §21000, *et seq.*

though that statute clearly prescribes such a requirement only in cases of projects of a public nature.¹⁰⁰

Interim Measures.

There can be no question that interim measures, such as the Burbank ordinance, are morally, socially and environmentally necessary. Many other interim measures, locally applied, can be adopted to ease the burden of aircraft noise on those who have the misfortune of having to reside in the vicinity of an airport servicing jet aircraft. These could include a requirement that only new jet aircraft which meet the noise standards adopted by the FAA could use particular airports during the nighttime hours.¹⁰¹ Similarly nighttime use of an airport as to existing jet aircraft could be restricted to such of these aircraft as have been retrofitted for noise suppression to the extent possible under the present state of the art. Other interim measures which have been adopted or suggested are the following: (1) sound-proofing of homes under the approach and departure paths in the areas of the greatest noise impact¹⁰² and (2) relocating those who reside in such areas to areas further removed. These latter measures could only be accomplished at very substantial cost both in money and in disruption of the lives of those who reside in these areas.

¹⁰⁰California Public Resources Code §21151.

¹⁰¹It is reported that Amsterdam's Schiphol Airport, one of Europe's largest, will be virtually closed at night for use by older jets starting Nov. 1 as a noise abatement measure. Among those certified for night operations will be the Boeing 747, Douglas DC-10, Lockheed 1011 and Fokker T-28. Jets built before 1969 will not be certified, officials said, for flights between 11:30 p.m. and 6 a.m.

¹⁰²The Los Angeles International Airport has undertaken a pilot program of sound-proofing selected dwellings in areas subject to the greatest noise impact caused by jet operations.

Injunctive Relief Through the Courts.

As has already been indicated to some extent, there is no present prospect of obtaining injunctive relief through the courts because of the views expressed by the lower courts in this case and in other Federal lower court decisions. The one bright spot is the decision of the New Jersey Superior Court in *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 Atl. Rptr. 2d 692 (1960), which imposed a curfew on jet operations at the Morristown Airport. However, it is reported that the Federal Aviation Administration is seeking a Federal court injunction to enjoin the enforcement of this curfew on the ground that it violates the Supremacy Clause of the United States Constitution,¹⁰⁸ and if the present pattern is followed, it will be successful. Even the California Supreme Court has been unwilling to use its injunctive powers to interfere with the flight paths of certificated air carriers using the San Diego Airport, although there are suggestions in the opinion that if the airport proprietor had been a party, it might have done something about the resulting noise pollution.¹⁰⁹

Reversal of *Griggs v. Allegheny County*.

A reversal of *Griggs v. Allegheny County*¹⁰⁸ to the extent of additionally imposing liability for the taking of air or noise easements on the Federal government and the airlines would no doubt serve to dramatically stimulate the Federal Aviation Administration and

the airport. See Berger, *Nobody Loves An Airport*, 43 So. Cal. L.J. 631 at p. 748.

¹⁰⁸See *Aviation Week & Space Technology*, November 6, 1972, at p. 19.

¹⁰⁹*Loma Portal Civic Club v. American Airlines, Inc.*, 61 Cal. 2d 32, 39 Cal. Rptr. 708, 394 P.2d 548 (1964).

¹¹⁰39 U.S. 84 (1962).

the airlines into taking more appropriate action in the areas of jet aircraft noise abatement. This, however, would not necessarily be an unmixed blessing in view of *Batten v. United States*.¹⁰⁹ Unless this latter decision were also overruled, State courts would remain the preferred forum for this type of litigation because damages for a lateral taking are generally permitted.¹¹⁰ Furthermore, although there is an enormous amount of litigation pending in which damages are sought for the taking of air or noise easements,¹¹¹ such litigation is painfully slow and in the end probably serves for the most part to benefit the attorneys involved. As was observed in the New Jersey case referred to above,¹¹² damages are not an adequate remedy for those whose lives and property are so severely affected by noise pollution caused by jet aircraft.¹¹³ Not everyone living

¹⁰⁹306 F. 2d 580 (1962) cert. denied, 371 U.S. 955 (1963), rehearing denied, 372 U.S. 925 (1963).

¹¹⁰*Martin v. Port of Seattle*, 64 Wash. 2d 309, 391 P. 2d 540 (1964), cert. denied, 379 U.S. 989 (1965); *Thornburg v. Port of Portland*, 233 Ore. 178, 376 P. 2d 100 (1962); *Thornburg v. Port of Portland*, 244 Ore. 69, 415 P. 2d 750 (1966); *Aaron v. City of Los Angeles*, 11 Avi. 17, 642 (Cal. Super. Ct. 1970).

¹¹¹It is reported. (Burbank Daily Review, October 12, 1972) that over \$14 billion worth of lawsuits are pending against the Los Angeles International Airport because of noise pollution created by that facility. The number and amount of such lawsuits is likely to increase because of the recent decision of the California Supreme Court in *Nestle*, footnote 93, *supra*.

¹¹²*Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 Atl. Rptr. 2d 692 (1969).

¹¹³In *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 101 Cal. Rptr. 568, 496 P. 2d 480 (1972), the plaintiffs were unable to establish that the value of their property had been decreased by noise pollution resulting from the operations at the Santa Monica Airport. It was no doubt for this reason that the California Supreme Court determined that an action for public nuisance would lie so that those who bear the impact of the noise pollution would have some remedy in terms of its effect on their health and use of their property.

in the vicinity of an airport owns the property on which he resides. It probably matters little to the landlord what the effect of such noise pollution may be on his tenants, since he would be looking ahead to the time when rezoning to commercial or industrial use would enable him to achieve a handsome profit. The remedy of damages serves no useful purpose to a senior citizen who has with considerable agony observed the proliferation and increase in jet aircraft noise. The value of his property has either remained static or decreased in spite of the inflationary trend. It would do him little good to seek damages since even if he were completely successful, and after payment of the fees of his attorney, he would be unable to duplicate what he presently possesses in another area. Other property owners would be similarly affected.

The Preemption and Conflict Doctrines.

The preemption and conflict doctrines of this Court mark out a sufficient area in which interim measures, such as the Burbank ordinance, can fit without violation of the Supremacy Clause of the United States Constitution, where, as here, Congress has not clearly indicated an intent to preempt the area of jet aircraft noise abatement. Any thoughts that Congress may have in this direction is tempered by the knowledge that if it does so, it will eliminate the shield from liability provided by *Griggs v. Allegheny County*.¹¹⁴ Should *Griggs* be reversed to the extent indicated, then this obstacle would be removed, but more importantly, should this Court sustain the Burbank ordinance, there is no doubt that the airlines and the Federal Aviation Administration would then prevail upon Congress to declare a

preemption of this field. To support this assertion requires nothing more than a reference to this Court's decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*¹¹⁵ The ink was hardly dry on that opinion when the airlines and the Federal Aviation Administration prevailed upon selected Congressmen to introduce legislation nullifying the Court's decision.¹¹⁶ This legislation was passed by both Houses of Congress and immediately sent to the President. Fortunately for those airports who had begun to rely and plan for the future on the basis of the per capita taxes validated by that decision, the preemptive legislation was included with appropriations for airports, and it was for this latter reason that the President vetoed the measure.¹¹⁷

Another example of the effectiveness of the airlines in overcoming State legislation is found in their ability to secure passage by Congress of legislation referred to as the Clean Air Amendments of 1970.¹¹⁸ One of the principal features of this legislation was a section which prohibited any State or political subdivision from adopting or attempting to enforce any standard respecting emissions of any air pollutant from any aircraft or engine thereof unless such standard was identical with the Federal standard.¹¹⁹ The stimulus and reason for their sudden activity was to forestall the necessity of their compliance with California air pollution standards.

¹¹⁵405 U.S. 707 (1972).

¹¹⁶Senate Bill 3755, 92nd Cong. 2d Sess.

¹¹⁷See *Aviation Week & Space Technology*, Nov. 6, 1972 at p. 27.

¹¹⁸Clean Air Amendments of 1970, P.L. No. 91-604 (December 31, 1970).

¹¹⁹See 42 U.S.C. §1857f-11.

applicable to jet aircraft which were shortly to become effective.

A subsequent declaration by Congress of preemption of the area of jet aircraft noise abatement would, under the existing preemption and conflict doctrines of this Court, nullify a favorable decision in this case, and would deprive States and local governments of any means to protect their citizens from the adverse effects of jet aircraft noise pollution.

In view of this we feel it imperative that the Court take this opportunity to reexamine and reconsider the preemption and conflict doctrines which have grown up over the years. It is to be hoped that after such a reconsideration, the Court will find and determine that there are areas, such as this and other areas affecting the health, safety and welfare of the citizens of the United States, in which State, local governmental or Court action cannot be precluded, notwithstanding a Congressional declaration of preemption of the particular field.

It is noted that there is some trend in the later decisions of the Court in that direction. This Court has uniformly recognized the legitimate interests of States and local governments in enacting legislation designed to protect the health, safety and welfare of its citizens and has been most reluctant to find Federal preemption in such cases,¹²⁰ in contrast to other cases involving other types of regulation.¹²¹ This has not al-

¹²⁰*Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific Railroad Co.*, 382 U.S. 423 (1966); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Terminal Railroad Ass'n of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943).

¹²¹*Local 24 International Brotherhood of Teamsters v. Oliver*, 38 U.S. 283, 297, (1959); *California v. Taylor*, 353 U.S. 553 (1957).

ways been so. In the earlier case of *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926), which involved the ability of States to prescribe automatic fire doors on railroad engine fire boxes and engine cab curtains, regulations admittedly designed to protect the health, safety and welfare of those involved in their operation, this Court flatly declared that the States involved could not do so because of Federal preemption. There is some language in that opinion out of harmony with the opinions in *Colorado Anti-Discrimination Com.*¹²² and *Head*.¹²³ A later decision of this Court, *Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1942), appears to have ignored *Napier*, even though it was cited in the briefs, and sustained a regulation of the Illinois Commerce Commission which required cabooses on trains operated in interstate commerce to protect the health, safety and welfare of those involved in their operation. In *Huron*,¹²⁴ although *Napier* was cited in the majority opinion,¹²⁵ it was chiefly relied upon by the dissent as support for the view that the Detroit air pollution ordinance had been preempted.¹²⁶ Notwithstanding this trend, the Court has continued to at least state the rule that if Congress has clearly expressed its intent to occupy a particular field, State or local regulation in that field will not be permitted.

¹²²372 U.S. 714 (1963).

¹²³374 U.S. 424 (1963). In this case and in *Colorado Anti-Discrimination Com.*, footnote 122, *supra*, this court held that where any power of the Federal agency involved remains "dormant and unexercised", State regulation in the area in which that power could be exercised is not preempted. *Napier* seems to be in disagreement (see 272 U.S. 605 at p. 613).

¹²⁴362 U.S. 440 (1960).

¹²⁵362 U.S. at p. 443.

¹²⁶362 U.S. at pp. 452-453.

However, there are some recent expressions of Justices of this Court which indicate some disenchantment with this rule. Thus in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), it is stated in the dissenting opinion as follows (394 U.S. at pages 397-398):

"Congress in adopting a federal regulation can make it exclusive of all state regulation, in which event one may not be required 'by a State to do more or additional things or conform to added regulations, even though they in no way conflicted with what was demanded of him under the Federal Act.' *Rice v. Santa Fe Elevator Corp.* 331 US 218, 236, 91 L Ed 1447, 1462, 67 S Ct 1146. And see *Campbell v. Hussey*, 368 US 297, 300-301, 7 L Ed 2d 299, 301-302, 82 S Ct 327. But that principle, although uniformly recognized, has provoked much dissent in its application, as the dissents in the *Rice* and *Campbell* cases illustrate.

"As Mr. Justice Brandeis said in *Napier v. Atlantic Coast Line*, 272 US 605, 611, 71 L Ed 432, 438, 47 S Ct 207, 'The intention of Congress to exclude States from exerting their police power must be clearly manifested.' And the Court, mindful of the force of the Tenth Amendment and the place of the States in our constitutional system, has resolved close cases in favor of a continuing power on the part of the States to legislate in their customary fields and thus has permitted state regulations to mesh with federal controls. See *Federal Compress Co. v. McLean*, 291 US 17, 78 L Ed 622, 34 S Ct 267; *Townsend v. Yeoman*, 301 US 441, 454, 81 L Ed 1210, 1220, 57

S Ct 842; Penn Dairies v. Milk Control Commission, 318 US 261, 87 L Ed 748, 63 S Ct 617.

"Even here, there have been dissents when it came to particular applications of the principle to the facts of a case."

Some judges of the lower Federal courts have indicated a similar reluctance in applying such an all-inclusive doctrine in areas where health, safety and welfare are involved. An example of this is found in the dissenting opinion in *Northern States Power Company v. State of Minnesota*, 447 F. 2d 1143 (1971), a case which is presently before this Court for review. While the dissent in that case recognizes the existence of the preemption and conflict doctrines which would preclude a State or local regulation if Congress so declares, the opinion suggests a doctrine which would be more in keeping with the situation as we presently find it in this country, and could well be a doctrine which must be adopted if the legitimate interests of States and local governments and their citizens are to be protected against the continuing encroachment of Federal power. It is there stated (447 F. 2d at pages 1157-1158):

"The majority opinion also observes that states might adopt overprotective environmental control regulations which would go the extent of stultifying the industrial development and use of atomic energy. I agree that such a possibility exists. However, in our present case the trial court decided the case on the basis of absolute preemption as a matter of law and refused to permit testimony on the reasonableness of the state regulations or the balancing of environmental protection against the desired development of the use of atomic energy.

The court made no findings upon such issue. The issue of the reasonableness of the state regulations and of whether they were so burdensome as to frustrate the development of atomic energy is not properly before us." (*Italics added.*)

That the need for a rule of reasonableness and necessity in environmental matters and other matters affecting public health, safety and welfare, in place of existing preemption and conflict doctrines, becomes more apparent as the Federal bureaucracy continues to expand and insert itself into matters both public and private. What we are faced with today could not have been envisioned by the framers of the United States Constitution. There was necessity then to protect the Federal government from those who would have preferred to continue under the Articles of Confederation. But the situation has changed. Now the States and local governments need protection from the continuing erosion of their powers by the Federal government. What is not being achieved directly under Federal legislation is being achieved indirectly by applying conditions to Federal grants such as those authorized under the Airport and Airways Development and Revenue Acts of 1970.¹²⁷

A more insidious trend is noted in recent Federal legislation. In the Air Quality Act of 1967,¹²⁸ Congress has delegated to the Administrator of the Environmental Protection Agency *veto power* over State air pollution regulations pertaining to motor vehicles.¹²⁹ The ultimate intrusion was achieved in the Noise Control Act

¹²⁷ 49 U.S.C. §1701, *et seq.*

¹²⁸ 42 U.S.C. §1857, *et seq.*

¹²⁹ 42 U.S.C. §1857f-6a(b).

of 1972, just recently enacted.¹⁸⁰ Although it is not entirely clear, it would appear that no State or political subdivision can establish and enforce standards or controls on environmental noise emitted by railroad equipment or facilities and motor carriers, or control their use, operation or movement, unless first *approved* by the Administrator.¹⁸¹ So we now have the legitimate exercise of the police powers of States and local governments in those areas subject to the whim or caprice of whoever may be occupying the position of Administrator in that Federal agency, or his subordinates.

The quality of our environment has deteriorated to such an extent that the freedom to live in an atmosphere of peace and quiet has been severely restricted. The "domestic tranquility" which the framers of the Constitution sought to promote is no longer with us, not only in the area of noise but also in other areas of citizen need.

The primary reason for this is that Congress has by and large ceased to be responsive to the will of the people. To a large degree needed legislation is under the control of committees of the House and Senate. Individual members of Congress can, by delaying tactics and other means, frustrate the passage of necessary legislation. Special interest groups, such as the airlines, appear to have an unusual ability to block legislation in the area of concern to them.

We, therefore, respectfully urge this Court to re-examine the preemption and conflict doctrines as pre-

¹⁸⁰House of Representatives Bill No. 11021, 92nd Cong. 2d Sess.; 118 Cong. Rec. (daily ed. Oct. 18, 1972) No. 169, at pp. S 18638-S 18643.

¹⁸¹See Section 17(c)(2) and Section 18(c)(2), Noise Control Act of 1972, footnote 130, *supra*.

ently enunciated and take upon itself the burden of defining those areas in which States and local governments may properly exercise their police powers, and the Courts may act, notwithstanding a declaration of Federal preemption. It is suggested that a proper rule would be that such State and local governmental enactments, and Court applied restraints, would be valid, provided it is demonstrated that the enactment or restraint in question is reasonable and necessary under the circumstances. Such a rule would find adequate support under the Ninth and Tenth Amendments.

CONCLUSION.

By reason of the foregoing, it is respectfully submitted that the decisions of the Court of Appeals and the District Court in this case should be reversed and the injunction issued by the District Court dissolved.

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APPENDIX.

Excerpt From Senate Report No. 1353 90th Congress, Second Session.

In this connection, the question is raised whether this bill adds or subtracts anything from the powers of State or local governments. *It is not the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local governments.*

"In this regard, we concur in the following views set forth by the Secretary in his letter to the committee of June 22, 1968:

The Courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines v. Town of Hempstead*, 272 F. Supp. 226 (U.S.D.C., E.D., N.Y., 1966). The court said at 231, "The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source." H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.

However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by

aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

'Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designated to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise consideration.'

'Of course, the authority of units of local government to control the effects of aircraft noise through the exercise of land use planning and zoning power is not diminished by the bill.

'Finally, since the flight of aircraft has been preempted by the Federal Government, State and local governments can presently exercise no control over sonic boom. The bill makes no change in this regard. (Italics added.)

**Excerpt From 34 Federal Register
18355-18356, Nov. 18, 1969.**

"Relation to responsibility of airport proprietors. Compliance with Part 36 is not to be construed as a Federal determination that the aircraft is 'acceptable,' from a noise standpoint, in particular airport environments. Responsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport. The noise limits specified in Part 36 are the technologically practicable and economically reasonable limits of aircraft noise reduction technology at the time of type certification and are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce. This limitation on the scope of Part 36 is required for consistency with the responsibilities placed upon the airport proprietor by the U.S. Supreme Court in *Griggs v. Allegheny County*, 369 U.S. 84 (1962). Consistent with this limited scope, this amendment specifies that the Federal Aviation Administration makes no determination, under Part 36, on the acceptability of the prescribed noise levels in any specific airport environment (see §§ 36.5 and 36.1581(a)) [T]he FAA, in response to the *Griggs* decision (see above), recognizes the right of State or local public agencies, as the proprietors of airports, to issue nondiscriminatory restrictions with respect to the permissible level of noise that can be created by aircraft using their airports. However, the FAA does not recognize any right of any State or local government agency that is not an airport proprietor to issue any regulation controlling the flight of aircraft for noise purposes." (34 Federal Register 18355-18356, Nov. 18, 1969.)

**UNITED STATES OF AMERICA
FEDERAL AVIATION ADMINISTRATION
DEPARTMENT OF TRANSPORTATION**

WASHINGTON, D. C.

Regulatory Docket No. 9071

**In the matter of the petition of
JORDAN A. DREIFUS**

to amend the Federal Aviation Regulations to prescribe aircraft noise regulations for turbojet aircraft operations at the Santa Monica, California Municipal Airport.

Denial of Petition.

By letter dated July 19, 1968, and supporting letters dated September 3, 1968, October 1, 1968, January 27, 1969, March 3, 1969, March 6, 1969, March 18, 1969, and May 24, 1969, Jordan A. Dreifus, on his own behalf, petitioned for rule making to amend the Federal Aviation Regulations to prescribe noise restrictions and limitations for turbojet aircraft operating at the Santa Monica Municipal Airport.

In support of his request, petitioner makes the following arguments (here condensed):

- (1) Petitioner's residence near the airport is becoming exposed to increasing turbojet aircraft traffic and resulting noise.
- (2) Other airport neighbors are suing the airport seeking damages based on aircraft noise.
- (3) The FAA has the authority under section 307 of the Federal Aviation Act to issue noise standards governing the flight of aircraft at the airport.
- (4) New section 611 of the Federal Aviation Act gives the FAA the duty to issue noise standards governing the flight of aircraft at the airport.

- (5) New section 611 of the Federal Aviation Act has probably obliterated all State or local authority to issue such regulations.
- (6) The exclusive jurisdiction of the FAA in the field of aircraft noise abatement was upheld in the case of *American Airlines, Inc. v. Town of Hempstead*, 272 Fed. Supp. 226 (1966).
- (7) Under Agency Order 7110.13, entitled "Aircraft Noise Abatement Programs," the FAA has instituted voluntary noise abatement procedures for airports including runway use restrictions, air traffic control procedures, and routings where compatible with safety.
- (8) Failure of the FAA to issue restrictions at Santa Monica and other airports would allow the State and local governments to issue their own airport use restrictions. The restrictions would result in chaos, confusion, interference and obstruction to aircraft operations, which could be contrary to the national interest. The local restrictions could be arbitrary, unreasonable and obscure, and could discriminate against "general aviation" as distinct from interstate commercial carriage or "air transportation." Aside from resulting in litigation, local discrimination against "general aviation" would be contrary to the Federal Aviation Act of 1958.
- (9) Failure of the FAA to issue noise abatement regulations for Santa Monica and other airports would be incompatible with the primary reason for the Federal Aviation Act of 1958, which was the unification of the control of aircraft operations in a single Federal agency to assure safety and the orderly development of aviation.

(10) State and local noise abatement restrictions would not be effective because of the uncertainty with which they would be met by the courts. Petitioner states that a Santa Monica municipal regulation concerning aircraft noise at the airport was recently declared invalid by a State court.

(11) The FAA has the authority to restrict the use of Washington National Airport.

Petitioner supplements the above arguments with noise exposure data developed by a consulting firm, a reference to noise levels specified in FAA Notice of Proposed Rule Making 69-1, the relationship of these figures to a Santa Monica Airport noise report, and newspaper articles concerning the severity of the airport noise problem.

Petitioner makes two basic requests, (1) a general request to issue any aircraft noise regulations "as may be necessary or appropriate in the circumstances" to relieve the noise burden on the neighbors of the Santa Monica Airport, and (2) a specific request to restrict the hours of operation of turbojet aircraft at the airport, as was attempted by the City of Santa Monica in the ordinance that petitioner states was held invalid by the State Court.

With respect to petitioner's first, general request, the FAA has, in fact, implemented Order 7110.13 (cited by petitioner) with respect to the Santa Monica Airport, in cooperation with the City of Santa Monica. This has involved (1) the use of a noise abatement runway when permitted by wind conditions; (2) the use of a noise abatement departure path to avoid congested areas; and (3) the use of raised traffic pat-

term. In addition, the FAA monitors the conditions at the airport in order to anticipate new noise problems or possible solutions, at the airport. Further, section 91.87 of Part 91 of the Federal Aviation Regulations prescribes noise abatement approach, departure, and runway requirements that must be complied with by turbine-powered and large airplanes. Beyond these rules, and the FAA's monitoring of the Santa Monica Airport under the FAA Order, the FAA believes that further relief from aircraft noise should involve airport use restrictions similar to those that petitioner states were issued in the Santa Monica City Ordinance. In short, the FAA at present does not know of any action, short of the type attempted by Santa Monica, that will satisfy the needs of the neighbors of the airport or supply the relief requested. In light of the above, petitioner's general request for rule making not of the kind attempted by the City of Santa Monica is hereby denied.

In support of petitioner's specific request for time limitations similar to those attempted by the City of Santa Monica, petitioner states that such rules "would avoid a major area of possible dispute with surrounding residents." The FAA agrees that nondiscriminatory time restrictions may be an effective and appropriate means of adapting aircraft noise to the needs of local communities. Petitioner states that the "final question for consideration is: what level of government has the power to so regulate or restrict aircraft operations? and what level of government *should be* the proper level to exercise such power?" With regard to the existence of Federal power to substitute its judgment for that of the local governments who own and operate airports, the FAA agrees with petitioner (see petitioner's arguments 3 and 4 above) that the Federal Avia-

tion Act provides broad powers in the field of aircraft noise abatement.

However, with respect to the question as to which level of government would be the proper one to deny the use of airports to aircraft on the basis of noise considerations (as would be involved in the requested time limitations), the FAA does not agree with petitioner that new section 611 of the Federal Aviation Act has obliterated the authority of State or local government proprietors of airports (see petitioner's argument 5 above). To the contrary, Senate Report 1353, *Aircraft Noise Abatement*, July 1, 1968, (concerning Public Law 90-411, H.R. 3400, July 21, 1968, which added new section 611 to the Federal Aviation Act of 1958) makes the following statement of Congressional intent concerning the relation of the new legislation to local government initiatives, and in so doing adopts *verbatim* views expressed by the Secretary of Transportation in his letter to the Senate Committee of June 22, 1968 (emphasis supplied):

The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines v. Town of Hempstead*, 272 F. Supp. 266 (U.S.D.C., E.D., N.Y., 1966). The court said, at 231, 'The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source.' H.R. 3400 would merely expand the Federal Government's role in a field

already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.

However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft, and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.

The broader policy behind the above quoted letter of June 22, 1968, was earlier stated, in other terms, in the Secretary's letter of March 1, 1968, to the Committee on Interstate and Foreign Commerce of the House of Representatives (emphasis supplied):

Local communities should, if not inconsistent with overriding national interest, have the option to determine the effects of transportation on their environment. . . .

The exercise of this and other authority by local communities should continue. Local communities select airport sites and determine where they best will serve community needs. They bear the responsibility for insuring compatible land use in the airport environs. They have the necessary promotional, proprietary, planning and land use authorities to carry out this responsibility. They have a very influential voice in determining the type of service they want through their appearances in route proceedings before the CAB. In short, given the limits imposed by aeronautical technology, the community can and should continue to bear a heavy share of the responsibility for assuring the compatibility of the air service they seek and enjoy with the environmental objectives of the community.

Based on the above guidelines, petitioner's remaining arguments (see above) supporting federally issued time restrictions at the Santa Monica Airport must be answered as follows:

Petitioner's argument 5, stating that new section 611 has probably obliterated all State and local authority to issue such regulations is not correct. While States may

not use their police power to regulate in any way the flight of aircraft for noise purposes, State and local governmental proprietors of airports may deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

Petitioner's argument 6, implying that the case of *American Airlines, Inc. v. Town of Hempstead* requires that the FAA issue time limitations for the Santa Monica airport is not supportable. While this case stated that noise limiting rules operating as those of the Hempstead ordinance must come from a Federal source, the material quoted from the Senate Report distinguished such ordinances from the action taken, by airport proprietors, to exclude aircraft, using their airports, because of noise considerations. The Hempstead ordinance was not an action taken by an airport proprietor to exclude aircraft from the airport.

Petitioner's argument 8, describing the adverse effects of local airport use restrictions is not supported by any facts or experience known to the FAA. This form of locally responsible noise control is clearly in the national interest in the light of the quoted portion of the Senate Report. Further, there is no indication that the noise restrictions required by petitioner would be discriminatively applied.

Petitioner's argument 9, covering the unification objective of the Federal Aviation Act of 1958, is correct insofar as it describes the need for a single Federal agency in the field of the safe, orderly development of aviation. However, the Senate Report makes it clear that just as the FAA recognizes the proprietary interest of airport operators by not requiring an airport to

accept service, so it should recognize the proprietary interest of airport operators by not substituting its judgment, so far as acceptance of noisy aircraft by the airport is conceived, for that of the State or local governmental elements that own and operate the nation's airports.

Petitioner's argument 10, covering the uncertainty with which State and local noise rules would be met by the courts, must be answered directly from the congressional intent expressed in the Senate Report: any action that would prevent any public airport proprietor from taking any nondiscriminatory action to exclude aircraft on the basis of noise considerations would appear to conflict with that express congressional intent. In any case, as stated above, the Senate Report states that the Federal Government should not substitute its judgment for that of public airport proprietors on the issue of the service desired by those proprietors and their resulting judgments concerning the locally determined need to accept or exclude aircraft on the basis of noise considerations.

Petitioner's argument 11, concerning FAA authority to restrict operations at Washington National Airport is not valid since the FAA is the proprietor of that airport. Such action by the FAA would not be a substitution of its judgment for that of a state or local governmental proprietor.

Although no FAA regulation concerning the local Santa Monica airport noise problem is appropriate at this time for the reasons mentioned above, it should be noted, as stated in notice 69-1, that the FAA is studying various types of operating rules for obtaining optimum noise levels around airports, and that, where such study

indicates that appropriate rules can be developed, they will be issued as a notice of proposed rule making for public comment.

In consideration of the foregoing, I find that the requested rule making under sections 307 and 611 of the Federal Aviation Act would not be in the public interest and that the institution of rule making is not justified. Therefore, in accordance with sections 11.73 and 11.27 of Part 11 of the Federal Aviation Regulations, the petition of Jordan A. Dreifus for rule making under sections 307 and 611 of the Federal Aviation Act, respectively, is hereby denied.

/s/ D. D. Thomas

D. D. Thomas

Acting Administrator

Issued in Washington, D.C. on 10 Jul, 1969.

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IN THE
Supreme Court of the United States
October Term, 1972

MICHAEL RODAK, JR.,

No. 71-1637

CITY OF BURBANK, *et al.*,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF THE PORT AUTHORITY OF NEW
YORK AND NEW JERSEY, AS AMICUS CURIAE.**

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CITY OF BURBANK, et al.,

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Appellees.

**APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF OF THE PORT AUTHORITY OF NEW
YORK AND NEW JERSEY, AS AMICUS CURIAE.**

Interest of Amicus Curiae

The Port Authority of New York and New Jersey which was not a party of an *amicus curiae* in the last aircraft noise case decided by this Court, *Griggs v. Allegheny County*, 369 U.S. 84 (1962), herewith submits a brief, *amicus curiae*, pursuant to Rule 42(4) of the Revised Rules of this Court. This rule provides that consent to file such a brief need not be had when, like the instant brief,

it is presented on behalf of a political subdivision of a State sponsored by its authorized law officer.¹

The specific issue on this appeal—the validity of a local police power ordinance prohibiting the takeoff of jet aircraft during nighttime hours from an airport serving air carrier aircraft—is of vital interest to your *amicus* which operates the three commercial airports in the New York-New Jersey metropolitan area, John F. Kennedy International and LaGuardia Airports in New York and Newark International Airport in New Jersey.

The Port Authority has, in its capacity as airport operator, established its own restrictions on the use of jet aircraft at its airports—restrictions which it believes are essential to the continued viability of its air terminal system. These restrictions were the subject of testimony in this case. Appellants' Appendix, Volume I, pp. 300-308. The Port Authority is vitally concerned that any decision which this Court might reach in the instant case does not jeopardize, in any way, the validity of the Authority's own limitations on jet aircraft flights. The airlines which use

¹ The present brief clearly falls within Rule 42(4) of the Revised Rules of this Court. The Port Authority of New York and New Jersey (formerly The Port of New York Authority) is a governmental agency of the States of New York and New Jersey, having been created by the Port Compact of 1921 between them, consented to by Congress. Ch. 154, Laws of N.Y., 1921; Ch. 151, Laws of N.J., 1921; 42 Stat. 174 (1921). That the Authority is a political subdivision of two States does not make it any less a political subdivision of one State. *Commissioner of Internal Rev. v. Shamburg's Estate*, 144 F. 2d 998 (2d Cir. 1944), cert. denied, 323 U.S. 792 (1945). See also *Helvering v. Gerhardt*, 304 U.S. 405 (1938); *Trippe v. Port of New York Authority*, 14 N.Y. 2d 119 (1964); *Port of New York Authority v. Hackensack Water Co.*, 41 N.J. 90 (1963).

As General Counsel of the Port Authority, I have been authorized to file this brief on the Authority's behalf by resolution of its Board of Commissioners, dated December 14, 1972, a copy of which is attached hereto as Exhibit A.

its three commercial airports have never acknowledged the Authority's power, as airport operator, to impose these restrictions on their jet aircraft and in a 1966 Federal court action one airline unsuccessfully contested the Port Authority's right to enforce a temporary ban on the use of jet aircraft on a runway at LaGuardia Airport.² That the validity of the Authority's own jet noise restrictions might be jeopardized by a decision here can be seen from the following statement contained in the brief submitted to this Court by the instant appellees in support of their motion to affirm the Ninth Circuit's decision: "... the scope of the power of an airport proprietor to impose noise restrictions is an unresolved issue involving difficult constitutional, statutory and contractual issues." p. 17, footnote.

While the Port Authority's restrictions on the use of jet aircraft at its airports go all the way back to 1951,³

² *Port of New York Authority v. Eastern Airlines*, 259 F. Supp. 745 (E.D.N.Y. 1966).

³ In 1951, seven years before the advent of commercial jet operations, the Port Authority, already concerned that the noise from jet-powered aircraft would prove far more annoying to airport neighbors than that produced by piston aircraft, adopted a regulation providing that no jet aircraft may use its airports without permission. *Resolution of Committee on Operations of Port Authority Commissioners*, July 12, 1951, pp. 22, 26. As the record in this case shows, it was the adoption of this regulation which led to the installation of noise suppressors on the first generation of jet aircraft used in commercial operation. Appellants' Appendix, Volume I, pp. 306-7. However, at that time no standard existed which measured a listener's reactions to aircraft noise. The Port Authority retained the acoustical firm of Bolt, Beranek and Newman of Cambridge, Massachusetts, to devise such a standard.

The standard ultimately devised was termed "perceived noise levels in units of PNdB decibels" which, as described by Leo L. Beranek, Karl D. Kryter and Laymon N. Miller, "expresses in a compact way the measure of 'noisiness' that is implicit in a listener's reactions to the sounds of aircraft and yet it is measured on a scale that is roughly comparable to the more familiar scales of physically-



the crucial importance of these restrictions to the Authority's financial viability was underscored by this Court's 1962 holding in *Griggs v. Allegheny County*, 369 U.S. 84. That case held, over the dissent of Justices Black and Frankfurter, that if, as the result of low altitude flights of commercial aircraft operating from a publicly-owned airport, an avigation easement is taken over nearby property, it is the airport operator, and not the United States or the airlines, who is the financially responsible party. We respectfully submit that this decision has had a most unfortunate impact on the aircraft noise problem since it placed

measured noise levels." The same authors go on to state "The perceived noise level takes into account the distribution of power as a function of frequency, i.e., the frequency spectrum of a sound. In particular, the perceived noise level of a sound reflects the fact that people judge higher frequencies to be more annoying or less acceptable than lower frequencies when factors such as 'meaning,' novelty, adaption, etc., are held constant." "Reaction of People to Exterior Aircraft Noise," *Noise Control*, September, 1959, at p. 287.

Therefore, in 1958 when the commercial airlines first sought permission from the Port Authority to introduce jet aircraft in scheduled operations, the Port Authority was able to establish a noise rule based on PNdBs. That rule (which has been in effect ever since although expressed in various ways) is based on the principle that permission to use jet aircraft is granted only on the condition that the noise produced by each jet flight in the communities under the take-off flight path, is no greater than that produced by 75% of the large 4-engine piston aircraft in use at the time jet aircraft were being introduced. That value, 112 PNdB, was set by the Port Authority as the limit for jet take-off noise. The method of meeting the 112 PNdB requirement is the responsibility of the aircraft operator. This may involve, in some cases, steeper climb angles, turns away from communities, reduced thrust over communities or reduced take-off weight. In addition, at John F. Kennedy International Airport, over-water takeoffs are required during nighttime hours. In every case, however, the Port Authority requires the aircraft to obey all applicable Federal regulations and if, for any reason, an aircraft is unable to comply with both sets of regulations in connection with a particular flight, permission for the flight does not exist. A copy of the Port Authority's current jet terms and conditions for John F. Kennedy International Airport is attached hereto as Exhibit B.

the financial burden of such noise on the one segment of the aviation community that is least able to obviate the financial consequences of aircraft noise exposure. At the same time, it removed from those segments of the industry who had the power to take meaningful action to alleviate aircraft noise all direct financial incentive to do so. Nevertheless, until the Court chooses to overrule *Griggs*, an airport operator has to live with its holding. And, in our opinion, an inevitable corollary of *Griggs* must be that such an operator possesses the right to protect itself from possible massive monetary liability to airport neighbors by limiting or otherwise conditioning the use that certain types of aircraft can make of its facilities. Otherwise, an impossible situation would be created for an airport operator since, in certain instances, only by restricting the use of jet aircraft can it avoid monetary liability to property owners aggrieved by aircraft noise.

Moreover, only by such regulatory power can the local airport operators set the stage for providing additional airport capacity, the development of which has, as a practical political matter, been virtually halted due to local concern over intolerable noise levels.

Summary of Argument

This brief will make one point in two interrelated parts. It will demonstrate that the legislative history of the noise abatement amendments to the Federal Aviation Act of 1958 shows a clear Congressional intent to preempt for exclusive Federal control the right of State and local governments to exercise their police powers in this area. In this same legislative history will show with equal clarity that Congress did not intend to preclude State and local governments, acting in their capacity as proprietors of our Nation's air terminal system, from taking action to limit aircraft noise.

We cannot and will not take issue with Burbank's assertion that the Federal Government has failed to take sufficient steps to alleviate severe aircraft noise pollution. Nor can we take issue with Burbank's conclusion that this failure is due in large measure to the refusal of Congress to authorize the Federal Aviation Administration (FAA) to take any action which might cause this Court to limit or overrule its decision in *Griggs*. The legislative history of the noise amendments to the Federal Aviation Act demonstrates that the Port Authority fully agrees with Burbank's position on these two matters.

ARGUMENT

Congress' intent, in the field of aircraft noise abatement, is to preempt for exclusive Federal Government control all State and local police power regulation but to permit airport operators to impose non-discriminatory restrictions on aircraft users.

A. The Legislative History of the 1968 Aircraft Noise Abatement Amendment

Until 1968, as the noise problem grew in intensity throughout the nation, the FAA steadfastly maintained that while it could cooperate with airport operators, airlines, airline pilots and communities in establishing preferential runways in the interest of noise relief, its power to do so was strictly incidental to its major function—flight safety regulation. And on the vital question of aircraft certification, the FAA's position, in effect, was that any air carrier aircraft which met its safety standards was entitled to certification, irrespective of the aircraft's noise characteristics.

The change finally came only four years ago when, at the urging of airport operators, the Executive Branch of the Federal Government and others, Congress enacted an air-

craft noise abatement statute in the form of an amendment to the Federal Aviation Act of 1958. Although neither this amendment, nor the subsequently passed Noise Control Act of this year contains any express provision preempting the field of aircraft noise regulation, the legislative history specifically defined the nature and scope of that preemption. It makes clear, beyond any reasonable doubt, that the City of Burbank's prohibition on nighttime jet takeoffs at the independently-owned Hollywood-Burbank Airport falls squarely within the preempted area.

This Congressional intent is expressed in the legislative history of the 1968 amendment (§ 611 of the Federal Aviation Act) in which the FAA was given, for the first time, express responsibilities and authority in the area of aircraft noise.

The 1968 amendment provides:

"In order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, the Administrator of the Federal Aviation Administration, after consultation with the Secretary of Transportation, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom. . . ." § 611, Federal Aviation Act; 49 U.S.C. § 1431(a)

The Report of the Senate Commerce Committee on H.R. 3400⁴ which became the 1968 amendment (§ 611 of the Federal Aviation Act) states in unequivocal language that:

"H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police

⁴The pertinent portion of the Senate Report is attached hereto as Exhibit C.

powers to control aircraft noise by regulating the flight of aircraft." S. Rep. No. 1353, 90th Cong., 2d Sess. at p. 6 (1968). See Exhibit C.

The Committee's conclusion follows a discussion of Judge Dooling's holding in *American Airlines, et al, Port of New York Authority, et al. v. Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), aff'd, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969), which the Committee used to define the nature and scope of Federal preemption in this field. The Senate Report points out that:

"The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines v. Town of Hempstead*, 272 F. Supp. 226 (U.S.D.C., E.D., N.Y., 1966). The court said, at 231, 'The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source . . .'" S. Rep., p. 6, see Exhibit C.

The *Hempstead* case involved an attempt by a town adjoining Kennedy International Airport to use its police power to protect its citizens from noise disturbance by prohibiting the operation of any mechanism or device, including aircraft, which created a noise within the town in excess of certain specified daytime and nighttime limits. Enforcement of the ordinance would have prevented the use of five runways at Kennedy Airport. Judge Dooling determined that the ordinance was an *indirect* attempt to exclude aircraft from the lower reaches of the navigable airspace. He pointed out that

"to exclude the aircraft noise from the Town is to exclude the aircraft; to set a ground level decibel limit for the aircraft is directly to exclude it from

the lower air that it cannot use without exceeding the decibel limit." 272 F. Supp. 226, 230.

He further found that:

"the ordinance does not forbid noise except by forbidding flights . . ." Id.

As the Senate Report states, Judge Dooling concluded that the Hempstead ordinance "operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source." Senate Report, p. 6. He therefore held that the ordinance invaded a field preempted by the Federal Government.⁶

The Burbank ordinance, like the Hempstead ordinance, is an attempt—direct rather than indirect—to use local police power to exclude aircraft from the navigable airspace and thus to regulate the flight of aircraft. The Senate Report specifically states that Congress has preempted State and local police power so to do.

But Congress did not intend entirely to prevent State and local governments from acting in this area. The Senate Report specifically states that:

"the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." Senate Report, p. 6.

⁶ Judge Dooling also held that the ordinance conflicted with valid applicable Federal regulations and was an unconstitutional burden on commerce. 272 F. Supp. 226, 235-236. On appeal, the Second Circuit upheld Judge Dooling's decision on the ground of conflict without reaching the questions of preemption and burden. 398 F. 2d 39, 376. fn. 4.

The right of an airport proprietor to act in this field was first claimed by the Port Authority to support its jet noise restrictions. As my predecessor stated in 1966 before a White House panel on the noise problem:

"... Port Authority restrictions are not based on police power considerations but rather upon the inherent right of a landowner to control, either by contract or otherwise, the activities of those who use his facilities—activities for which . . . the airport operator might be held liable to property owners in adjacent communities. It seems clear that the Port Authority possesses the power to require its airline tenants to refrain from using its facilities in such a way as to subject it to money damage claims brought by airport neighbors or otherwise to engage in activities that will prove detrimental to its good name or to that of its airports."*

The Senate Report gives the following rationale for continued participation by airport operators:

"Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate

* EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF SCIENCE AND TECHNOLOGY, A Report of the Jet Aircraft Noise Panel—Alleviation of Jet Aircraft Noise Near Airports, p. 136 (1966). This Report is part of the legislative history of the 1968 Noise Abatement Amendment. See S. Rep. No. 1353, pp. 2, 10.

our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations." Senate Report, p. 7.

In other words, the Senate Committee not only agreed with the Port Authority's contention that there is a legal distinction between local ordinances and a landlord's restrictions but it was happy to do so for two reasons. First, the record shows that the Senate Committee was worried lest the expansion of the Federal Government's regulatory powers to include noise certification would affect its legal and financial liability, possibly leading to an overturning of *Griggs*.¹

Second, the Committee acknowledged that an airport proprietor could control aircraft noise by making a determination not to expand or improve an existing airport for the purpose of accommodating noisier jets. It knew that in reaching such a decision the airport proprietor must balance noise costs against the need for air commerce. It further recognized that noise costs (additional land acquisition or aviation easements) could be minimized by airport restrictions designed to make the noisy jet more compatible with the neighboring community. Lastly, it faced up to the fact that the attempts by airport operators to establish new jetports were increasingly blocked by citizen

¹At the Senate Hearing on H.R. 3400, Senator Monroney asked two related questions. The first was:

"... Will enactment of this legislation causing direct Federal involvement in the field of aircraft noise abatement and control increase the legal liability of the Federal Government for damage and damage claims caused by aircraft noise or sonic boom?"

And the second was:

"Would this legislation to any degree preempt State and local government regulation of aircraft noise and sonic boom?"

Hearing on S. 707 and H.R. 3400, Before Aviation Subcommittee of The Committee on Commerce, United States Senate, 90th Congress, 2nd Session, pp. 28-29 (1968).

concern over aircraft noise.⁸ The Senate Committee therefore concluded that the growth of air commerce would be best served by giving specific sanction to the airport operator's right to restrict the use of its air terminals for noise abatement purposes.

If, however, this Court should determine that an airport operator has no such right, then we submit that *Griggs v. Allegheny County* must be overruled since such a right is the only way the airport operator can guard against the monetary liability imposed on it by that decision. We do not mean to imply that this would be the only situation that would call for an overruling of *Griggs*. That case dealt solely with piston aircraft and the record there failed to reflect the magnitude of Federal Government and airline involvement in, and responsibility for, the aircraft noise problem in the age of jet airliners. Appellants correctly point out that overruling *Griggs* would "stimulate the Federal Aviation Administration and the airlines into taking more appropriate action in the areas of jet aircraft noise abatement". Appellants' brief, pp. 77-78.

B. The Contemporaneous Construction of the 1968 Aircraft Noise Abatement Amendment

The preamble to the first regulation issued by the FAA under the 1968 amendment contains a thorough discussion

⁸ *Senate Hearing*, p. 43. See also *American Airlines, et al., Port of New York Authority, et al. v. Town of Hempstead*, 272 F. Supp. 226, 228 (E.D.N.Y. 1966) and Appendix "A" to this Brief, concerning the Port Authority's unsuccessful attempts to locate a new jetport. Cf. *Matter of Stoll v. Port of New York Authority*, 61 Misc. 2d 207, 208, 305 N.Y.S. 2d 17, 19 (Sup. Ct. 1969) *aff'd*, 32 A.D. 2d 892, 301 N.Y.S. 2d 943 (1st Dept. 1969), motion for leave to appeal denied, 25 N.Y. 2d 743, 306 N.Y.S. 2d 1025 (1969) where noise was undoubtedly the cause of some of the "political and social considerations" referred to by the court in explanation of why there thus far has not been a fourth jetport in the New York-northern New Jersey metropolitan area.

of the scope of Federal preemption in the field of noise abatement. 14 C.F.R., Part 36. This contemporaneous construction of the 1968 amendment explained that:

"Responsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport. The noise limits specified in Part 36 . . . are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce. This limitation on the scope of Part 36 is required for consistency with the responsibilities placed upon the airport proprietor by the U.S. Supreme Court in *Griggs v. Allegheny County*, 369 U.S. 84 (1962). Consistent with this limited scope, this amendment specifies that the Federal Aviation Administration make no determination, under Part 36, on the acceptability of the prescribed noise levels in any specific airport environment (see §§ 36.5 and 36.1581(a)).

. . .

. . . the FAA, in response to the *Griggs* decision (see above), recognizes the right of State or local public agencies, as the proprietors of airports, to issue nondiscriminatory restrictions with respect to the permissible level of noise that can be created by aircraft using their airports." 34 Federal Register 18355-18356, November 18, 1969.

However, the preamble cautioned that the FAA:

" . . . does not recognize any right of any State or local government agency that is not an airport proprietor to issue any regulation controlling the flight of aircraft for noise purposes." *Id.* at 18356.

Indeed, four months earlier the Acting FAA Administrator had given the very same construction to the 1968 amendment in denying a petition for rule making. *In re Dreifus*, FAA Regulatory Docket, No. 9071, July 10,

1969, Appellants' brief, App. 4-13. The petition asked the FAA to adopt a rule prescribing time limitations for turbojet aircraft operating at Santa Monica, California, Municipal Airport similar to those imposed by that City's nighttime curfew ordinance which had been declared invalid by a state court decision.⁹ The Administrator first pointed out that:

"The FAA agrees that nondiscriminatory time restrictions may be an effective and appropriate means of adapting aircraft noise to the needs of local communities." Appellants' brief, App. 7.

He then addressed himself to the question of which "level of government has the power to so regulate or restrict aircraft operations?" Appellants' brief, App. 7. Based upon a complete review of the legislative history of the 1968 amendment, the Administrator concluded:

"While States may not use their police power to regulate in any way flight of aircraft for noise purposes, State and local governmental proprietors of airports may deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." Appellants' brief, App. 10.¹⁰

A year later the FAA again recognized the authority of an airport proprietor to regulate in the aircraft noise field when it issued its Advance Notice of Proposed Rulemaking (ANPRM) on Civil Supersonic Aircraft Noise Type Certification Standards which would involve amending 14 C.F.R.,

⁹ That decision was reversed on appeal and the right of the City of Santa Monica, proprietor of the airport, to impose a curfew was upheld. *Stagg v. The Municipal Court*, 2 Cal. App. 3d, 318, 82 Cal. R.P.T.R. 578 (1969).

¹⁰ It is interesting to note that the Administrator had issued the High Density Traffic Airports Rule earlier that year. 14 C.F.R., Part 93, Subpart K, Feb. 26, 1969. Obviously, he saw no possible conflict between that rule and an airport proprietor's noise restrictions.

Part 36. 35 Fed. Reg. pp. 12555-56, August 6, 1970. The ANPRM specifically requested comments directed to the following question:

"The development of methods to be applied to ensure that maximum use of the regulatory authority under § 611 is made, with respect to civil supersonic aircraft, without Federal interference with the right of States or local public agencies, as the proprietors of airports, to issue regulations or establish requirements as to the permissible level of noise which can be created by aircraft using their airports (see Senate Report 1353, pp. 6, 7)." *Id.*

C. The Legislative History of the Aircraft Noise Section of the 1972 Noise Control Act

Contrary to the contention made by the Attorney General of California, appearing herein *amicus curiae*, Supp. Brief, pp. 14-16, the legislative history of the Noise Control Act of 1972 only serves to reaffirm the fact that Congress intended to preempt State and local police power in the field of aircraft noise emissions but to permit regulation by airport proprietors.¹¹ Section 7 of the 1972 Act, dealing with aircraft noise emissions, like the 1968 amendment (§ 611), contains no express preemption provision. The brief of the Attorney General of California erroneously argues that the absence of such an express provision in Section 7 and the inclusion of such a provision in a similar bill which originally passed the Senate indicates that Con-

¹¹ Section 7(b) of this Act amends the 1968 statute (§ 611) to require, *inter alia*, the Administrator of the Environmental Protection Agency to submit to the FAA proposed regulations which the Administrator determines are necessary to protect the public health and welfare. Noise Control Act of 1972, Public Law 92-574, 92d Cong., 86 Stat. 1234. The Act combines provisions from House and Senate bills on this subject passed earlier this year. The original version of H.R. 11021 was passed by the House on February 29, 1972 but was never concurred in by the Senate. 118 Cong. Rec. H. 1539 (daily ed. Feb. 29, 1972). A Senate version, S. 3342, was passed by the Senate on October 13, 1972, but was never concurred in by the House. 118 Cong. Rec. S. 18007 (daily ed. Oct. 13, 1972).

gress consciously determined not to preempt this field, pp. 14-16. The fact, however, is that both the Senate and House Committees which considered the respective noise control bills included in their Reports unequivocal statements assuring all parties concerned that the bills would make no change in the existing preemption rule.

Thus, the House Report to accompany H.R. 11021, written with full knowledge of the legislative history and contemporaneous construction of the 1968 amendment (§ 611), states that:

"No provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of the State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill." House Report No. 92-842, 92nd Cong. 2d Sess., p. 10 (1972).

Senate Bill 3342, as reported out by the Senate Committee on Public Works, contained the following preemption section:

"Sec. 506. No State or political subdivision thereof may adopt or attempt to enforce any standard respecting noise emissions from any aircraft or engine thereof unless such standard is identical to a standard applicable to such aircraft under this part."

The Report of the Senate Committee on Public Works on S.3342, as above amended, states in clear and unequivocal terms that:

"States and local governments are preempted from establishing or enforcing noise emission standards for aircraft unless such standards are identical to standards prescribed under this bill. This does not address responsibilities or powers of airport operators, and no provision of the bill is intended to alter in any way the relationship between the authority of the Federal government and that of

State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill. Senate Report No. 92-1160, 92 Cong. 2d Sess., pp. 10-11 (1972).

Senate S.3342 was subsequently changed by an amendment offered by Senator Tunney and therefore the final version, as passed by the Senate, but not the House, contained a new § 506 (renumbered § 505). The new § 505 which the Senate passed provided:

"Sec. 505. No State or political subdivision thereof may adopt or enforce any standard respecting noise emissions from any aircraft or engine thereof."

At the time he sponsored the amendment, Senator Tunney explained:

"There was no intention in the committee bill to alter the relative power of the Federal Government, State and local government, and airport operator, over the control of aircraft noise. This amendment would also retain the same powers for all parties." 118 Cong. Rec. S. 17989 (daily ed. Oct. 13, 1972).

As previously noted, although the Noise Control Act of 1972, which was finally passed, contains no express aircraft noise preemption provision, Congress' obvious intent concerning preemption is crystal clear, to wit, there should be no change in the relative powers among (a) the Federal Government, (b) State and local governments, and (c) airport operators regarding the regulation of aircraft noise from that which existed prior to its adoption. Categorical declarations to this effect are contained in both the relevant Senate and House Committee Reports which we have just quoted. No contrary statement is to be found in the entire legislative history of the act.

CONCLUSION

In light of the foregoing, we respectfully submit that the decision below should be affirmed since Congress intended, in the field of aircraft noise abatement, to preempt for exclusive Federal Government control all local police power regulations such as that enacted by the City of Burbank which is the subject of this appeal. At the same time, Congress desired, as we have shown, that airport operators possess the right to impose nondiscriminatory restrictions on the aircraft users of their facilities in the interest of noise abatement. And, if for any reason, this Court concludes that such right does not exist, then we believe that *Griggs v. Allegheny Co.* must be overruled.

Respectfully submitted,

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Proof of Service

I, PATRICK J. FALVEY, a member of the Bar of the Supreme Court of the United States, and General Counsel of The Port Authority of New York and New Jersey, appearing herein, *Amicus Curiae*, hereby certify that on the 22nd day of December, 1972, I served copies of the foregoing brief on counsel for Appellants, counsel for Appellees, and counsel for the State of California, *Amicus Curiae*, by mailing three copies thereof in a duly addressed envelope, with air mail postage prepaid, to each of the following in this cause:

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EXHIBIT "A"

Resolution adopted by Board of Commissioners of The Port Authority of New York and New Jersey at its meeting of December 14, 1972 (appearing at pp. 495-496 of the Official Minutes of that date).

Lockheed Air Terminal Inc. v. City of Burbank, Inc.-Filing of Brief Amicus Curiae

It was reported that the United States Supreme Court on October 10, 1972, noted probable jurisdiction in *Lockheed Air Terminal v. City of Burbank, Inc.*, a case involving the constitutionality of an ordinance of the City of Burbank, California, prohibiting the departure of jet aircraft from the Hollywood-Burbank Airport between 11:00 p.m. and 7:00 a.m. Hollywood-Burbank Airport is owned and operated by Lockheed Air Terminal, Inc., a private corporation but is utilized by regularly scheduled airlines. The Air Transport Association of America joined Lockheed in challenging the constitutionality of the ordinance.

The case comes before the nation's highest court on appeal from a judgment of the United States Court of Appeals for the Ninth Circuit. That Court ruled that the Burbank ordinance is invalid under the supremacy clause of the United States Constitution because it (1) invades a field preempted by Congress for exclusive regulation by the Federal Government, and (2) conflicts with a previously enacted Federal Aviation Administration runway preference rule for nighttime use of the airport.

The ultimate resolution of the issues in the Burbank case is important to the Port Authority for two reasons. First, there has been increasing pressure in the communities surrounding Port Authority airports for the establishment of nighttime curfews. This community pressure in large part was responsible for the pending suit brought by the At-

"A" Exhibit "A"

torney General of New York against the Port Authority and the air carriers using the New York airports, which, in addition to other relief, seeks to curtail flights during evening hours at these airports. The Port Authority has long been convinced that such night curfews would adversely affect commerce and industry in the Port of New York.

Second, although the Port Authority supports the holding of the Court of Appeals for the Ninth Circuit, it is General Counsel's opinion that the sweeping language used by that Court to invalidate the ordinance will subsequently be employed by the airlines to strike down noise restrictions imposed by airport operators. The airlines have never conceded the validity of Port Authority restrictions which in one form or another have been in effect since 1951 and have advised the United States Supreme Court in this proceeding that the power of an airport proprietor in this field remains an unsolved issue involving "difficult constitutional, statutory and contractual issues." It is essential that the Port Authority's right to bar or restrict aircraft from its airports remain unimpaired in order that it can protect airport neighbors from undue noise and at the same time limit the Port Authority's legal responsibility and financial liability. This is particularly pertinent in view of the coming entrance into service of supersonic aircraft, the noise emissions of which are not limited in any way by Federal law or regulation. In addition, it is conceivable that the Port Authority may find it necessary to impose stricter noise restrictions, including some type of nighttime restrictions, to keep its air terminal system viable. The Port Authority's failure to develop a fourth jetport was due in large measure to citizen concern with aircraft noise and the resultant lack of airport capacity was a partial reason for the imposition of hourly quotas on aircraft movements at Port Authority airports.

Exhibit "A"

It is recommended, therefore, that the Board authorize the filing of a brief *amicus curiae* with the Supreme Court in support of Lockheed's position that Section 20-32.1 of the Burbank, California ordinance prohibiting pure jets from taking off from Hollywood-Burbank Airport between 11:00 p.m. and 7:00 a.m. is invalid under the supremacy clause because the City is purporting to exercise its police power in an area which has been preempted by the Federal Government and in so doing, protect the integrity of the Port Authority's current noise restrictions for jet aircraft as well as its right to impose additional limits, should this be necessary, to keep the Port Authority air terminal system viable.

Whereupon, the following resolution was unanimously adopted:

RESOLVED, that General Counsel be and he hereby is authorized, on behalf of the Port Authority, to file a brief *amicus curiae* with the United States Supreme Court in the case of Lockheed Air Terminal, Inc. v. City of Burbank, Inc. in support of the airport and airlines position that Section 20-32.1 of the Burbank ordinance prohibiting pure jets from taking off from Hollywood-Burbank Airport between 11:00 p.m. and 7:00 a.m. is invalid under the supremacy clause because the City is purporting to exercise its police power in an area which has been preempted by the Federal Government and in so doing, protect the integrity of the Port Authority's current noise restrictions for jet aircraft as well as its right to impose additional limits, should this be necessary, to keep the Port Authority air terminal system viable.



FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED.

EXHIBIT "C"

**Excerpt from Senate Report No. 1353,
90th Congress, Second Session (1968)**

Relation to Local Government Initiatives

The bill is an amendment to a statute describing the powers and duties of the Federal Government with respect to air commerce. As indicated earlier in this report, certain actions by State and local public agencies, such as zoning to assure compatible land use, are a necessary part of the total attack on aircraft noise. In this connection, the question is raised whether this bill adds or subtracts anything from the powers of State or local governments. It is not the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local governments.

In this regard, we concur in the following views set forth by the Secretary in his letter to the committee of June 22, 1968:

The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines v. Town of Hempstead*, 272 F. Supp. 226 (U.S.D.C. E.D., N.Y., 1966). The court said, at 231, "The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source." H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.

Exhibit "C"

However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.

Of course, the authority of units of local government to control the effects of aircraft noise through the exercise of land use planning and zoning powers is not diminished by the bill.

Finally, since the flight of aircraft has been preempted by the Federal Government, State and local governments can presently exercise no control over sonic boom. The bill makes no change in this regard.

IN THE

Supreme Court of the United States

October Term, 1972
No. 71-1637

THE CITY OF BURBANK, et al.,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., et al.,

Appellees.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE APPELLEES

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IN THE
Supreme Court of the United States

October Term, 1972
No. 71-1637

THE CITY OF BURBANK, et al.,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., et al.,

Appellees.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE APPELLEES

OPINIONS BELOW

The opinion of the court of appeals, reported in 457 F.2d at 667, is set forth at A. 410. The district court opinion, reported in 318 F. Supp. at 914, is reproduced at A. 341. The findings of fact and conclusions of law made by the district court are reproduced at A. 375.

QUESTIONS PRESENTED

1. Was the court of appeals correct in holding that the Burbank curfew ordinance is invalid under the Supremacy Clause because the city is purporting to exercise its police power in an area which has been preempted by the federal government?

2. Was the court of appeals correct in holding that the Burbank curfew ordinance is invalid under the Supremacy Clause because the ordinance is in conflict with an order of the Federal Aviation Administration applicable to nighttime flight operations at the Hollywood-Burbank Airport and with the federal statutory right of free transit through the navigable airspace?

3. Does the Burbank ordinance constitute an invalid attempt to regulate a phase of the national commerce which, because of its speed, volume, and complexity, must be regulated by a single authority?

4. Does the burden imposed on interstate commerce by enforcement of a local curfew render the Burbank ordinance invalid?*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Art. VI, cl. 2 of the United States Constitution, reads as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;

* In addition to holding the Burbank ordinance invalid on the Supremacy Clause grounds, the district court also reached the Commerce Clause issues (questions 3 and 4) and answered each in the affirmative. The court of appeals did not find it necessary to go beyond the Supremacy Clause questions (A. 414).

and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Commerce Clause, Art. 1, sec. 8, cl. 3 of the United States Constitution, reads as follows:

"The Congress shall have Power . . .

" . . .

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"

The Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. § 1301, *et seq.*, is centrally involved in this appeal, as are the regulations thereunder, 14 C.F.R. Parts 71-77 and 91-97. Among the pertinent sections of that Act are the following:

Section 1508 of 49 U.S.C. provides, in part:

"The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States"

Section 1304 of 49 U.S.C. provides:

"There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."

Section 1348 of 49 U.S.C. provides, in part:

"(a) The Administrator is authorized and directed to develop plans for and formulate policy with re-

spect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace”

“ . . .

“(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.”

Section 7 of the Noise Control Act of 1972, Pub. L. No. 92-574 (Oct. 27, 1972), which amends section 611 of the Federal Aviation Act, 49 U.S.C. § 1431 (providing for control and abatement of aircraft noise and sonic boom), is set forth in Appendix A to this brief.

Burbank ordinance No. 2216 (the “curfew ordinance”), held invalid below, added section 20-32.1 to the Burbank Municipal Code. It provides as follows:

“Sec. 20-32.1 Aircraft Take-Offs.

“(a) Pure Jets Prohibited from Taking Off Between 11:00 P.M. and 7:00 A.M.

“It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(b) Airport Operator Prohibited from Allowing Take-Offs.

"It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(c) Exception: Emergencies.

"This Section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off."

STATEMENT

1. Nature of the Case and Prior Proceedings.

This is an appeal under 28 U.S.C. § 1254(2) from a decision of the United States Court of Appeals for the Ninth Circuit entered on March 22, 1972, which unanimously affirmed a judgment of the United States District Court for the Central District of California. The judgment of the district court declared invalid an ordinance of the City of Burbank which purports to impose a night curfew on jet aircraft takeoffs at Hollywood-Burbank Airport. Appellants are the City of Burbank and various of its officials responsible for enforcement of the ordinance. Appellees are Lockheed Air Terminal, Inc., owner and operator of the Hollywood-Burbank Airport, Pacific Southwest Airlines, an intrastate carrier, and the Air Transport Association of America, an unincorporated trade association consisting of some thirty-two United States scheduled interstate air carriers.

On March 31, 1970, the City Council of Burbank passed the curfew ordinance prohibiting takeoffs of jet aircraft from the Hollywood-Burbank Airport between 11:00 p.m. and 7:00 a.m. Following the effective date of the ordinance, Lockheed Air Terminal, Inc., the airport owner, and Pacific Southwest Airlines filed this action in the United States District Court for the Central District of California seeking to have the ordinance declared unconstitutional and to enjoin its enforcement. The Air Transport Association of America was permitted to intervene as a plaintiff. The Federal Aviation Administration appeared *amicus curiae* in support of plaintiffs, and the State of California appeared in that capacity in support of defendants.

On September 24, 1970, after trial, the district court (Crary, J.) filed a memorandum opinion holding that the plaintiffs were entitled to declaratory and injunctive relief on both Supremacy Clause and Commerce Clause grounds (A. 341). On November 30, 1970, the district court signed and filed its findings of fact and conclusions of law (A. 375) and entered its judgment declaring the Burbank ordinance unconstitutional, illegal, and void, and enjoining its enforcement (A. 408).

Burbank sought review in the Ninth Circuit. Again, the Federal Aviation Administration and the State of California participated as *amici*. On March 22, 1972, the court (Browning, Duniway and Trask, J.J.) issued its opinion affirming the judgment of the district court (A. 410).

2. The Relevant Facts.

The district court's detailed Findings, of course, provide the authoritative context for this appeal (A. 375-

401).^{*} Appellants' "Statement of the Case" largely ignores the findings and fails to deal adequately with the facts relevant to the issues presented by this appeal. The relevant findings and facts established by the record are summarized below:

(a) *The Hollywood-Burbank Airport.* The Airport was dedicated May 30, 1930, and has been in continuous use since that time by both private and commercial aircraft. There are two runways for the operation of aircraft at Hollywood-Burbank Airport, each of which can be used in either direction depending upon wind conditions. The Airport occupies approximately 535 acres, of which approximately 128 (including significant portions of each runway) are owned by the federal government. Although the major portion of the Airport lies within the City of Burbank, a portion of the Airport is within the City of Los Angeles. (F.F. 6, A. 377; F.F. 18, A. 380-81.)

Hollywood-Burbank Airport is an important "satellite" airport in the national air transportation system. Satellite airports, such as Hollywood-Burbank or Oakland International and San Jose Municipal in the San Francisco area, are airports that serve geographical areas immediately adjacent to major metropolitan areas which also have one or more "hub" or major airport facilities. These satellite airports play an essential role in the national air transportation system in relieving air and ground congestion, in reducing air-traffic delays at

^{*} The Burbank brief is replete with unproven and often irrelevant factual assertions, purportedly based upon such non-record sources as articles in newspapers and other periodicals, and statements by deeply engaged partisans during the congressional debates. See, e.g., Br. pp. 22-32.

primary airport centers, and in providing more convenient service to the surrounding areas, which are of sufficient size in terms of population and economy to require their own air service. The important role of satellite airports is recognized by the Civil Aeronautics Board in its route investigations. (F.F. 11, A. 379; F.F. 13, A. 379.)

Hollywood-Burbank Airport forms a vital link in interstate and intrastate commerce. It is included in the National Airport Plan promulgated by the Administrator of the Federal Aviation Administration pursuant to the Federal Airport Act of 1946, ch. 251, 60 Stat. 170.* And it is the most convenient airport in the greater Los Angeles metropolitan area for the entire San Fernando Valley, Hollywood, and the cities of Burbank, Glendale, Pasadena and Alhambra, an area containing a population of 2.2 million persons. (F.F. 14, A. 379; F.F. 17, A. 380.) (The City of Burbank has a population of 95,000 (F.F. 7, A. 377).)

In 1969 there were approximately 32,000 air carrier movements at Hollywood-Burbank Airport serving 1,178,000 commercial passengers in regularly scheduled interstate and intrastate transportation. Approximately 97 percent of these operations were conducted by pure jet aircraft. (F.F. 20, A. 381; F.F. 6, A. 377.)

Hollywood-Burbank Airport has been an important commercial airport for Los Angeles for a number of years. Until 1946 all commercial flights into or from Los Angeles were conducted out of this airport. In that year Hollywood-Burbank counted 82,000 commercial

* This Act was superseded by the Airport and Airway Development Act of 1970, which carries forward the requirement of a "national airport systems plan." 49 U.S.C. § 1712 (a).

movements serving 1,200,000 passengers. Military jets began operating from the Airport immediately following World War II.

Commercial service at Hollywood-Burbank declined in 1947 with the opening of what is now Los Angeles International, but by 1953 had rebounded to approximately 780,000 passengers annually. The advent of large commercial jet aircraft, which could not be accommodated at Hollywood-Burbank Airport, again caused a dip in the number of operations in 1959. But with the introduction of two and three-engine jet aircraft in 1965, the Airport experienced an upsurge in commercial operations which had continued to the time of trial. (A. 140-42, 159.)

The Burbank City Council has on several occasions requested and supported additional air transportation services at Hollywood-Burbank Airport in route proceedings before the Civil Aeronautics Board. The Mayor and City Council of Burbank expressly requested and supported the additional air service from Burbank to the Pacific Northwest, which route was awarded by the CAB on May 12, 1970 to Continental Air Lines. The CAB order required that this service be provided through the Los Angeles satellite airports, including Hollywood-Burbank Airport, rather than through Los Angeles International.* (F.F. 15-16, A. 380.)

* In authorizing this new route, the CAB stressed the importance of service rendered at satellite airports such as Hollywood-Burbank, stating in part: "The absence of such service, coupled with the ever-increasing dispersion of population, commerce and industry over vast areas in the two great metropolitan agglomerations [of Los Angeles and San Francisco], has resulted in many thousands of travelers being forced to undergo increasingly lengthy surface journeys over increasingly congested freeways to the international airports in order to commence their interstate journeys" PX 35, at pp. 6-7; Pacific Northwest-California Investigation, C.A.B. Docket No. 18884, CCH Av. L. REP. ¶21,932 (May 12, 1970).

(b) *The Curfew Ordinance.* Following enactment, Burbank city officials publicly announced their intention to enforce the curfew ordinance (F.F. 9, A. 378). Immediately, the ordinance required PSA to cancel a regularly scheduled flight which it had operated for over two years serving an average of 125 passengers, 80 of whom were boarding at Hollywood-Burbank Airport (F.F. 61, A. 394). And although Continental Air Lines was granted new authority from the CAB to commence regularly scheduled interstate service from Hollywood-Burbank Airport to Portland and Seattle, the Burbank curfew ordinance would prevent Continental from filling out its service pattern by the addition of a southbound after-dinner flight (F.F. 65-66, A. 395).

(c) *The Scope of Federal Regulation.* The district court found that the federal statutes, regulations, and orders have completely occupied the field of the regulation of the use of navigable airspace and aircraft operations (F.F. 58, A. 393). The trial court's findings of fact reflecting the federal statutes and regulations governing air carrier operations are in Findings 23-27; those with respect to certification of aircraft, airmen and airports are in Findings 28-33; those with respect to the framework of federal centralized management and control of navigable airspace are in Findings 34-40; those covering federal control of all aspects of aircraft flight operations are in Findings 41-47; those relating to the exercise of centralized management and control directed to achieving the maximum efficient use of the navigable airspace, including flow control and high density traffic airport regulations, are in Findings 48-53; and those covering federal regulation of aircraft noise abatement are in Findings 54-57. Together, these Findings provide a comprehensive summary of the pervasiveness of federal regulation of all aspects of

aircraft operations, use of the navigable airspace and aircraft noise abatement generally and at Hollywood-Burbank Airport.

Each scheduled interstate air carrier that uses Hollywood-Burbank Airport holds a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board, which authorizes and obligates the carrier to engage in air transportation and to provide adequate service with respect to persons, property and mail over specified routes. (F.F. 24, A. 382; C.L. 17, A. 404-05.) The Operations Specifications issued by the FAA to each carrier require these carriers to operate their turbojet aircraft within the navigable airspace in accordance with instrument flight rules (IFR) and specifically authorize the use of Hollywood-Burbank Airport (F.F. 27, A. 383).

Every portion of the flight of a commercial jet aircraft takes place under the direct control of an FAA facility, from the filing of a flight plan, through the assignment of a runway and clearance to taxi thereto, the takeoff clearance, the assignment of a standard instrument departure procedure (PX 7, A. 452-53) and a radio beam intersection to which to fly, to the assignment of a standard instrument approach procedure (PX 7) and clearance to approach for landing on an assigned runway. (F.F. 41-47, A. 386-89.)

(d) *The Efficient Use of Airspace.* In exercising centralized management and control over the navigable airspace of the United States, the FAA has as one of its statutory goals the efficient use of this airspace, which includes the expeditious movement of aircraft. A variety of techniques are used by the FAA to insure efficient use of the presently congested airspace, includ-

ing the utilization of centralized flow control procedures and high density airport rules which are discussed, respectively, in Findings 51-52 and 53-54 (A. 390-92). (F.F. 49-50, A. 390.)

As an aspect of effective airspace management, Lockheed is subject to federal regulation, as owner and proprietor of the Hollywood-Burbank Airport. The Federal Aviation Act of 1958 prohibits the establishment or construction of civil airports not receiving federal funds, such as Hollywood-Burbank, or even the substantial alteration of a runway layout, without prior compliance with regulations prescribed by the Administrator. 49 U.S.C. § 1350. This requirement was established "in order to assure conformity to plans and policies for, and allocation of, airspace by the Administrator" *Id.*

The FAA also directly regulates Lockheed, and all other airports serving air carriers certificated by the CAB, through the terms, conditions and limitations of the airport operating certificate issued by the Administrator (F.F. 33, A. 384). An airport cannot be operated without such a certificate. 49 U.S.C. §§ 1430 (a)(8), 1432. Prior to commencement of jet operations at Hollywood-Burbank Airport, the FAA determined under 49 U.S.C. §§ 1426, 1301(8), (22) that takeoffs and landings of jet aircraft on each runway would not be unsafe to persons and property on the ground or in the air (F.F. 19, A. 381). In addition, essential parts of the airport, including costly navigation aids and the Airport Traffic Control Tower and Radar Approach and Departure Control, are actually operated and maintained by the FAA itself pursuant to license agreement with Lockheed. (F.F. 36-37, A. 385; PX 5, 6, A. 440-52.)

(e) *Noise Abatement Regulations.* Actions taken by the FAA to achieve noise abatement at airports gener-

ally are summarized in Findings 54, 55 and 57 (A. 392-93). Such actions include regulations prescribing minimum altitude during descent for landing and climb rates after takeoff, as well as standard instrument departures to reduce noise over residential areas between 11:00 p.m. and 7:00 a.m.

Prior to the enactment of the Burbank curfew ordinance, the FAA took in hand the subject of nighttime takeoffs at Hollywood-Burbank Airport and acted to minimize the consequences of those operations by issuing the noise abatement order summarized in Finding 56 (A. 392). This order, which was issued by the FAA Chief of the Burbank Air Traffic Control Tower, establishes a preferential runway for departures of jet aircraft between the hours of 11:00 p.m. and 7:00 a.m. In issuing this order the responsible federal official announced his determination that the noise abatement procedures which it established were "designed to reduce community exposure to noise to the lowest practicable minimum" (PX 30, A. 454).

The trial court found that pursuant to this order, "the preferential runway is assigned by the FAA control tower [between 11:00 p.m. and 7:00 a.m.] by incorporation into an aircraft's departure 'clearance' as an instruction to the pilot" (F.F. 56, A. 393). Any person violating an air traffic control clearance or instruction is subject to a civil penalty and to suspension or revocation of his airman's certificate. 49 U.S.C. §§ 1429, 1430(a) (5), 1471; 14 C.F.R. § 91.75. The testimony showed that the preferential runway established by the order was used except for a "few occasions" when the control tower permitted deviation because of unusual weather or operating conditions affecting safety (A. 318, 322-23).

The FAA also employs its noise abatement authority in the field of aircraft design and performance. On November 18, 1969 regulations were adopted prescribing noise standards which must be met as a condition of type certification for new subsonic turbojet aircraft. 34 Fed. Reg. 18355, now published at 14 C.F.R. Part 36. Airplanes of older type design produced after July 1, 1973 would be required to comply with these "Part 36" noise standards under an FAA Notice of Proposed Rulemaking issued July 7, 1972. 37 Fed. Reg. 14814. And on October 30, 1970, the Administrator issued an Advance Notice of Proposed Rulemaking concerning "civil airplane noise reduction retrofit requirements." 35 Fed. Reg. 16980.

(f) *Effect on Commerce.* The district judge found that air commerce, by reason of its speed and volume, requires regulation by a single authority if it is to be conducted with maximum safety and so as to achieve efficient use of the navigable airspace (F.F. 59, A. 394; C.L. 21, A. 406). The evidence was uncontradicted that air transportation problems are not amenable to solution by local regulation (A. 368).

The district judge also found, upon the basis of uncontradicted testimony, that if the curfew ordinance were upheld, similar ordinances would be adopted by virtually all cities surrounding airports (F.F. 69, A. 396). Such a proliferation would adversely affect the aviation industry, the members of the traveling public, and the national economy (F.F. 70, A. 396).

The impact of such an ordinance on airline scheduling extends well beyond the period of any particular curfew and beyond the boundaries of the regulated airport. The Burbank ordinance alone restricts the period that Continental may originate departures from Seattle to twelve

hours of the day. (F.F. 66, A. 395.) And if curfews were adopted nationwide, departures between widely separated cities would be limited to less than one-third of the hours of the day (F.F. 68, A. 396).

The testimony showed that each day, some 1,009 scheduled domestic interstate departures occur throughout the United States between 11:00 p.m. and 7:00 a.m., and all these flights would have to be cancelled if a curfew were imposed on a nationwide basis (F.F. 74, A. 397). Continental Air Lines alone would have to cancel over 48 flights per day, and its operating costs would be increased by approximately 25 percent (F.F. 71-72, A. 397). Other carriers would be similarly affected (F.F. 73, A. 397).

Over 48 percent of the nation's air mail is carried during curfew hours. Nationwide imposition of a curfew would annually delay billions of pieces of mail at least one day in delivery. (F.F. 79, A. 399.) In addition, the air freight industry, which exists upon its ability to operate during curfew hours, would be required to cancel approximately 42 percent of the all-cargo services (F.F. 80-81, A. 399-400).

The testimony also showed that the imposition of curfew ordinances would cause a bunching of flights in the hours immediately preceding the curfew. This would have the twofold effect of increasing an already serious congestion problem and of actually increasing, not relieving, the noise problem by increasing flights in the period of greatest annoyance to surrounding communities. The district court found that this "result is totally inconsistent with the objectives of the federal statutory and regulatory scheme." (F.F. 78, A. 399.)

Thus, based upon uncontradicted evidence, the district court found that the imposition of curfew ordinances on

a nationwide basis would (1) drastically restrict the hours available for flight scheduling far beyond the curfew period, (2) severely impair the efficiency of the aircraft maintenance system, (3) require extensive re-scheduling at enormous inconvenience and expense, (4) deteriorate air transportation service to the public, (5) increase the already serious congestion problem, and (6) intensify the noise problem in the hours immediately preceding the curfew. (F.F. 67-68, 70-82, A. 396-400.)

3. Decision of the District Court.

The district court held that the federal government has preempted the field of regulations governing and controlling the use of airspace and air traffic. From its analysis of the federal statutes and regulations, the court concluded that "Congress intended to centralize full and dominant control of the navigable air space in the Federal Government so as to provide for its safe and most efficient use" (A. 361). The court also held that local curfew legislation "would conflict with the certificated rights and obligations" of the air carriers (A. 367-68).

The district court also ruled that the Burbank ordinance would violate the Commerce Clause in two respects. First, based upon its holding that the effect of the ordinance is to be considered on a "national basis," the court held that the ordinance cannot stand because there would be a "very serious loss of efficiency as to the use of air space" and the carriage of interstate passengers and goods would be "seriously interrupted" (A. 367). Second, the trial court held that "air commerce, by reason of its speed and volume, requires a single authority in control if it is to be conducted at maximum safety and efficient use of the navigable air space" (A. 368).

4. Decision of the Court of Appeals.

On March 22, 1972 the Ninth Circuit held the Burbank curfew ordinance invalid under the Supremacy Clause, finding it unnecessary to reach the Commerce Clause issues.

With respect to preemption, the court of appeals found that the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1301-1542, created a comprehensive scheme to deal with air commerce at the federal level and that the overall design of Congress was to centralize in a single authority the power to promulgate rules and regulations for the use of the nation's airspace. The court found that Congress, in amending the Act in 1968, 49 U.S.C. § 1431, confirmed federal preemption of the field of aircraft noise regulation so as to exclude the exercise of State and local police power in this area. (A. 420-23.)

The Ninth Circuit also held that the Burbank curfew ordinance conflicted with the federal scheme of aviation regulation when tested by the standards of *Perez v. Campbell*, 402 U.S. 637 (1971), because it "interferes with the balance set by the FAA among the interests with which it is empowered to deal . . ." (A. 426). The circuit noted that at the time the Burbank ordinance was passed, the FAA had already issued and put into effect preferential runway use procedures with respect to night operations designed to reduce aircraft noise in the vicinity of the Hollywood-Burbank Airport to "the lowest practicable minimum." The court held that the attempt by the City of Burbank to go beyond the noise abatement measures adopted by the FAA "frustrates the full accomplishment of the goals of Congress." (A. 426-27.) In addition, the court ruled that the effect of the curfew was to terminate the federal statutory right of free transit through

the navigable airspace (A. 426 n.12). Judge Browning limited his concurrence to the conflict portion of the opinion.

SUMMARY OF ARGUMENT

Introduction

The context for the basic issue before the Court — whether a city can exercise its police power to impose a curfew on commercial jet flights — is the rapidly increasing dependence of our nation on its air transportation system. In the last two decades, the number of air passengers and the amount of air cargo and air mail have increased at a phenomenal rate.

Nighttime operations are crucial to the air transportation system, the record here indicating that 48% of the air mail and 42% of air cargo is carried during curfew hours. More than 1,000 scheduled flights would have to be cancelled every night if the Burbank curfew were applied nationally.

The unique nature of air commerce, together with our nation's dependence on it, is a theme which runs through all of the legal arguments. Aircraft travelling at 600 miles an hour constitute a way of travel which quickly escapes the bounds of local regulative competence. The testimony at the trial showed that the approach to problems of air transportation at the local level just does not work; it has to be done on a national basis because it is a national operation. Uncoordinated local attempts at regulation would produce confusion and chaos, and rather than solving the problem of aircraft noise would merely shift it to another community or another airport or another time period.

I. Preemption

The comprehensive Federal Aviation Act of 1958, 49 U.S.C. § 1301, *et seq.*, displays an unmistakable congressional intention to preempt the management of navigable airspace and regulation of aircraft flight operations. That Act, which establishes a public right of freedom of transit through the navigable airspace, directs the Federal Aviation Administrator to adopt regulations "to insure the safety of aircraft and the efficient utilization of such airspace." 49 U.S.C. §§ 1304, 1348(a). The authoritative Senate Report on the Act states that the Act was intended to vest "unquestionable authority for all aspects of airspace management in the Administrator of the new Agency [the FAA]."

The 1968 amendment to the Act, 49 U.S.C. § 1431, made explicit the FAA's responsibility with respect to the abatement of aircraft noise. It directed the Administrator to prescribe regulations "for the control and abatement of aircraft noise and sonic boom." This amendment carefully laid out the factors which the Administrator is to consider and balance in formulating noise abatement regulations. 49 U.S.C. § 1431(b), supplementing 49 U.S.C. § 1303.

The legislative history of the 1968 amendment states that it would "expand the federal government's role in a field already preempted" and that "state and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." S. REP. No. 1353, 90th Cong., 2d Sess. 6-7 (1968). While the legislative history states that airport proprietors retain certain powers to exclude certain types of aircraft based upon noise considerations, this statement is not relevant here because the City of Burbank is not the proprietor of Hollywood-Burbank Airport.

The FAA has issued regulations of formidable proportions, impressive detail, and manifest sophistication. There are extensive regulations for noise abatement (including regulations covering the nighttime hours at Hollywood-Burbank Airport) as well as significant regulations for efficient use of the navigable airspace (including, for example, flow control procedures affecting aircraft on the ground at Hollywood-Burbank Airport).

The Noise Control Act of 1972, Pub. L. No. 92-574, constitutes a further assertion by the federal government of its dominance in the field of the abatement of aircraft noise. Under the terms of the new Act, the expertise of the Environmental Protection Agency (EPA) will bolster the broad regulatory power of the FAA under existing law. The new statute calls for a study by the EPA which will consider, among other things, "the imposition of curfews on noisy airports." 118 Cong. Rec. S 18644.

The federal regulatory scheme meets all three tests for preemption laid down in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), and subsequent cases. First, viewed in sequence, the 1958 Act, the 1968 Amendment, and the 1972 Noise Control Act constitute a complete and pervasive occupation of the fields of airspace management and the regulation of aircraft operations and aircraft noise. Second, the congressional statutes and regulations pertaining to management of the navigable airspace unquestionably touch a field in which the federal interest is dominant. Finally, it is clear that uncoordinated local regulation would produce a result inconsistent with the objective of federal law, which is to secure efficient as well as safe use of the navigable airspace.

The Burbank curfew ordinance intrudes into this exclusive federal domain. It would deny jet aircraft access to the navigable airspace for fully one-third of each day.

As the district court concluded, the local imposition of curfews would cause a "very serious loss of efficiency" with the result that the statutory objective would be "compromised" (C.L. 16, A. 404). Moreover, curfews would increase the already serious congestion problem and also actually increase, not relieve, the noise problem by pushing more flights into the periods of greatest annoyance.

II. Conflict

Apart from the preemption issue, there is a "conflict" between the Burbank ordinance and an FAA order. At the time the ordinance was enacted, federal officials had already taken the subject of nighttime flights in hand: aircraft operations at Hollywood-Burbank Airport were already subject to an FAA noise reduction order (BUR 7100.5B) which established a preferential runway system for departures between 11:00 p.m. and 7:00 a.m. The Burbank ordinance would make a nullity of the FAA order and would, as the court of appeals unanimously held, conflict and interfere with the balance set by the FAA among the interests with which it is empowered to deal. In addition, the curfew would interfere with the federally guaranteed right of free transit through the navigable airspace. The Supremacy Clause bars a local enactment which would so frustrate the full accomplishment of the goals of Congress. *Perez v. Campbell*, 402 U.S. 637, 649 (1971).

III. Commerce Clause

Even in the absence of the comprehensive federal legislation present here, the Commerce Clause protects the

national commerce from hostile actions of local governments. One of the tests for the validity of a local law is whether it operates in an area where regulation should be prescribed by a single authority. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768-69 (1945). As the district court found, airspace management and the regulation of aircraft operation is such an area (F.F. 59, A. 394). The volume of air commerce, the speed with which it is conducted, and the technical complexity of aircraft scheduling, operations, and maintenance combine to establish a powerful need for centralized management.

The Burbank ordinance is also defective under the other test laid down in *Southern Pacific Co. v. Arizona*, namely whether the local regulation impedes substantially the flow of commerce. 325 U.S. at 768-69. Under this test, a local regulation should not be viewed as an isolated phenomenon but rather the Court should consider the effect on commerce if similar regulations were enacted throughout the United States.

There would be a "near catastrophic effect on the national air transportation system" if the Burbank curfew were applied on a national basis (F.F. 70, A. 396). For example, the air cargo industry exists upon its ability to operate during curfew hours, and the required cancellation of these all-cargo services would have a drastic impact upon the nation's business community (F.F. 80-81, A. 399-400). And billions of pieces of mail annually would be delayed at least one day in delivery (F.F. 79, A. 399). These massive disruptions in the national air transport system clearly constitute an unreasonable burden on interstate commerce and impede substantially its free flow.

ARGUMENT

Introduction.

The basic issue before the Court is whether a city can exercise its police power to impose a curfew on jet flights into the navigable airspace from an airport which the city does not own or operate and from which regularly scheduled commercial operations are conducted.

The nation's dependence on commercial air transportation has increased at a phenomenal rate in the last two decades. Passenger miles on certificated air carriers in the United States rose from 8,029 million miles in 1950, to 30,556 million miles in 1960, and to 104,155 million miles in 1970. Air cargo ton miles rose from 226 million in 1950, to 611 million in 1960, and to 2,295 million in 1970. Air mail ton miles in the United States grew from 47 million in 1950, to 136 million in 1960, and to 714 million in 1970.*

Nighttime operations are crucial to the air transportation system upon which the nation so heavily relies. The record here shows that 48% of the air mail** and 42% of air cargo is carried during curfew hours (F.F. 79-80, A. 399-400). If the Burbank curfew should spread to the entire system (and the district judge found that it would if upheld here, F.F. 69, A. 396), more than 1,000 flights would have to be cancelled every night (F.F. 74, A. 397-98). It was not hyperbole for the district court to find that a national curfew on the Burbank model would have

* Civil Aeronautics Board Handbook of Airline Statistics, Tables 15, 27 and 40 (1971).

** The postal policy of the United States as established by the 1970 Postal Reorganization Act, 39 U.S.C. § 101, *et seq.*, provides that the achievement of "overnight transportation to the destination of important letter mail to all parts of the nation shall be a primary goal of postal operations." 39 U.S.C. § 101(f).

a "near catastrophic effect on the national air transportation system" (F.F. 70, A. 396).

The unique nature of air commerce, together with our nation's dependence on it, is a theme which runs through all of the legal arguments, as this Court early perceived, air commerce legally and literally "soared into a different realm than any that had gone before." *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 107 (1948). "A way of travel which quickly escapes the bounds of local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past." *Id.* at 107.

The special character of air transportation pervaded the testimony at the trial. The testimony showed that during a single 24-hour period, a typical commercial aircraft, travelling at 600 m.p.h., will make stops in 10 different states and overfly perhaps another 10 states (A. 258). The former director of the United States Army Aviation, Clifton F. von Kann, testified that "aircraft have such a range and speed and they involve such technical complexity that they have to be managed on a centralized basis" (A. 258). James T. Pyle, former administrator of the Civil Aeronautics Administration, testified:

"The approach to the solution of problems in air transportation at the local level just does not work. It has to be done on a national basis because it is a national operation." (A. 295.)

Given the nature of air commerce, "there would be utter chaos," testified Mr. Pyle, if there were a proliferation of ordinances enacted by intersecting and overlapping local jurisdictions, all addressing themselves to the same basic problem in air transportation (A. 296).

The major airports of the nation are so located that, if Burbank's ordinance were upheld, many of them would be subject to having their flight operations restricted by the police power of at least two and sometimes several local jurisdictions. And inevitably, uncoordinated local attempts at regulation do not solve the aircraft noise problem but merely shift it to another community or to another airport or another time period. (A. 292-93.)

In the pages which follow, we will show that Burbank's purported exercise of police power over air commerce is invalid because it invades a field which has been preempted by the federal government, because it conflicts with federal orders and statutes, and because it runs afoul of the Commerce Clause.

I. THE FEDERAL GOVERNMENT HAS PRE-EMPTED THE MANAGEMENT OF AIRSPACE AND THE REGULATION OF AIRCRAFT OPERATIONS AND AIRCRAFT NOISE.

In 1958 Congress enacted the comprehensive Federal Aviation Act, providing for the management of the navigable airspace and regulation of aircraft operations. The 1958 Act also contained a general provision which provided authority for the issuance of noise abatement regulations by the Federal Aviation Administration. 49 U.S.C. § 1348(c). In 1968 Congress enacted a specific section (now § 611) for "the control and abatement of aircraft noise and sonic boom." 49 U.S.C. § 1431(a). This specific federal authority for aircraft noise abatement was elaborated and confirmed by the Noise Control Act of 1972, Pub. L. No. 92-574 (Oct. 27, 1972).

In this section, we will first review these three crucial enactments and the pertinent regulations, and then discuss the legal effect of the pervasive statutory and regulatory scheme.

A. The Federal Aviation Act of 1958.

The cornerstone of the statutory scheme involved here is the Federal Aviation Act of 1958, 49 U.S.C. § 1301, *et seq.* (the "Act" or the "1958 Act"). The United States is declared "to possess and exercise complete and exclusive national sovereignty in the airspace of the United States," 49 U.S.C. § 1508(a). The Act also declares that "there is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States," 49 U.S.C. § 1304.

The Act authorizes and directs the Federal Aviation Administrator (the "Administrator"):

"[T]o develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the *safety of aircraft and the efficient utilization of such airspace.*"* 49 U.S.C. § 1348(a).

The above-quoted section is the "heart" of the Act. S. REP. No. 1811, 85th Cong., 2d Sess. 14-15 (1958) (hereafter "S. REP. No. 1811"). This key section of the Act stresses the dual purpose of federal regulation of the use of navigable airspace:

- (1) "to insure the safety of aircraft;" and

* Unless otherwise noted, emphasis is added throughout.

- (2) to insure "the efficient utilization of such airspace."

The legislative history of the Act illuminates the purpose of Congress to "vest in a single Administrator plenary authority for airspace management." S. REP. No. 1811, at 15. The Senate Report pointed out that responsibility for air traffic control planning "has until quite recently been scattered among a plethora of interagency committees and boards instead of being concentrated in one overall authority." The Report indicated that "this situation has been made almost inevitable by the lack of any clear provision in present law for unified control of our national airspace." *Id.* at 13.

Previous efforts to achieve airspace allocation or unified control rested, said the Report, "upon the shifting sands of legal ambiguity." *Id.* at 14. The 1958 Act was intended to end the uncertainty:

"The present legislation proposes to clear away this ambiguity once and for all by vesting unquestionable authority for all aspects of airspace management in the Administrator of the new Agency." S. REP. No. 1811, at 14.

The comprehensive character of the 1958 Act itself leaves little doubt that Congress intended to provide the Administrator with the tools necessary to exercise his "plenary" authority. For example, the Administrator is authorized to develop plans and formulate policy with respect to the use of navigable airspace and allot the use of such airspace as he deems proper, 49 U.S.C. § 1348(a); prescribe rules governing the flight of aircraft, 49 U.S.C. § 1348(c); promote air commerce by establishing and maintaining air navigation facilities, 49 U.S.C. §§ 1303(d), 1348(b); prescribe certain types of equip-

ment airplanes must utilize, 49 U.S.C. § 1423(a)(1); issue airworthiness certificates to aircraft which are in a condition for safe operation, 49 U.S.C. § 1423(c); issue air carrier operating certificates specifying the federal airways over which each carrier is authorized to operate, 49 U.S.C. § 1424(b); and issue airman certificates specifying the capacities in which the holders are authorized to serve, 49 U.S.C. § 1422(a).

In exercising his powers, the Administrator is directed to consider the following factors as being in the "public interest":

"(a) The regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense;

"(b) The promotion, encouragement, and development of civil aeronautics;

"(c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both;

"(d) The consolidation of research and development with respect to air navigation facilities, as well as the installation and operation thereof;

"(e) The development and operation of a common system of air traffic control and navigation for both military and civil aircraft." 49 U.S.C. § 1303.

Under section 1348(c) of 49 U.S.C., the Administrator is authorized and directed "to prescribe air traffic rules and regulations . . . for the protection of persons and property on the ground." Prior to the 1968 enactment of an explicit noise abatement section (§ 611), the Administrator prescribed FAA noise abatement pursuant to the authority and direction conferred by this section. *See,*

e.g., 25 Fed. Reg. 1764, 1767 (1960); 26 Fed. Reg. 9069, 9071 (1961).

Federal dominance in the fields of airspace management and air traffic control is not diminished by the "saving clause" in section 1506 of 49 U.S.C., which is relied upon by Burbank (Br. p. 35) and by the State as *amicus* (Br. p. 17). In "saving" the "remedies now existing at common law or by statute," this "boilerplate" provision preserves tort law remedies such as the right of individuals to commence wrongful death actions. See, e.g., *Fitzgerald v. Pan American World Airways, Inc.*, 229 F. 2d 499, 502 (2d Cir. 1956); *Porter v. Southeastern Aviation, Inc.*, 191 F. Supp. 42 (M.D. Tenn. 1961). But the preservation of these preexisting tort law remedies cannot be thought to provide any support for an ordinance such as Burbank's which infringes on an area where federal preemption is, as the court of appeals said in this connection, "unavoidable." (A. 424). Saving clauses of this type have long been held to preserve only those remedies not inconsistent with the purpose of the enactment. See *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U.S. 121, 129-30 (1915); *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).

B. The 1968 Noise Abatement Amendment.

In 1968, following hearings in both houses, Congress focused specific attention on the problem of aircraft noise. This effort resulted in the adoption of a new section of the Federal Aviation Act (§ 611) which directed the Administrator to prescribe rules and regulations for the control and abatement of aircraft noise and sonic boom, as follows:

"In order to afford present and future relief and protection to the public from unnecessary aircraft

noise and sonic boom, the Administrator of the Federal Aviation Administration, after consultation with the Secretary of Transportation, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards, rules, and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this subchapter." 49 U.S.C. § 1431(a).

Supplementing 49 U.S.C. § 1303 (quoted above, p. 28), the 1968 amendment carefully laid out the additional factors to be considered by the Administrator in prescribing such noise abatement regulations:

"In prescribing and amending standards, rules, and regulations under this section, the Administrator shall —

"(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this chapter and chapter 23 of this title;

"(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

"(3) consider whether any proposed standard, rule, or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

"(4) consider whether any proposed standard, rule, or regulation is economically reasonable,

technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

“(5) consider the extent to which such standard, rule, or regulation will contribute to carrying out the purposes of this section.” 49 U.S.C. § 1431(b).

Thus, in formulating noise abatement regulations, the FAA is obligated under 49 U.S.C. §§ 1303 and 1431(b) to balance the need for environmental protection with considerations of safety, efficiency, common defense and available technology. As the court of appeals held, the statutory scheme vested in the FAA the responsibility to “resolve the proper balance among the multiple purposes” (A. 419).

The legislative history of the 1968 amendment supports the conclusion that the federal government has preempted the power of local government to deal with aircraft noise by controlling the flight of aircraft. The authoritative Report of the Senate Commerce Committee states:

“In this regard, we concur in the following views set forth by the Secretary [of Transportation] in his letter to the committee of June 22, 1968:

“The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines v. Town of Hempstead*, 272 F.Supp. 226 (U.S.D.C., E.D., N.Y. 1966). The court said, at 231, “The legislation operates in an area committed to Federal care, and noise limiting rules operating

as do those of the ordinance must come from a Federal source." H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. *State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.'*" S. REP. No. 1353, 90th Cong., 2d Sess., July 1, 1968, 2 U.S. CODE CONG. & AD. NEWS 2693-94 (1968).

Burbank (Br. p. 48) purports to find comfort in the following portion of the Senate Committee Report relating to the powers of an airport "proprietor" (the entity owning and operating the airport):

"However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." *Id.* at 2694.

In discussing the powers of the airport proprietor, the Committee Report states that "just as an airport owner is responsible for determining how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft." *Id.* at 2694. This language is drawn from *Griggs v. Allegheny County*, 369 U.S. 84, 89 (1962), where the Court held that the airport proprietor has to pay the bill if flights are found to constitute a "taking" of a landowner's property.

The difficulty with Burbank's argument based upon the 1968 Committee Report is that the appellant City of Burbank is not the proprietor of Hollywood-Burbank Airport. The proprietor of this airport is the appellee Lockheed Air Terminal. Accordingly, the court of appeals correctly rejected Burbank's argument:

"The City of Burbank has no proprietorship interest in H-B Airport. It is making an effort to exert its police power in the field of noise regulation, which the Secretary states, and the Committee agrees, has been preempted by the Federal Government. The Supremacy Clause, U.S. Const. art. VI, cl. 2, invalidates that effort." (A. 423.)

Although not involved in this case, it should be noted that the ultimate scope of proprietary power is an unresolved issue involving difficult constitutional, statutory, and contractual issues. See *Opinion of the Justices*, ____ Mass. ____, 271 N.E.2d 354, 358-59 (1971). For example, under the Supremacy Clause, an airport operator would be barred from imposing a restriction on flight operations which would stand "as an obstacle to accomplishment and execution of the full purposes and objectives of Congress." *Perez v. Campbell*, 402 U.S. 637 (1971). Airport restrictions on air commerce could also be vulnerable to attack under the Commerce Clause or under grant agreements between the proprietor and the federal government. But the proprietary powers, whatever they may be, are held by Lockheed, not by the City of Burbank.

C. The Scheme of Federal Regulation.

Pursuant to his broad statutory authority, the Administrator of the FAA has issued complex and detailed operational rules and regulations which control the flight of aircraft and govern the use of the navigable airspace

(14 C.F.R. Parts 71-77, 91-97). The highlights of these regulations, as applicable in this case, are described in Findings 34, 35 and 38-47 (A. 385-89). Reference to these regulations will confirm the correctness of the appraisal made by Judge Dooling in *American Airlines, Inc. v. Town of Hempstead*:

"The powers granted by the Congress are not dormant but actively exercised. The regulations of the Administrator are of formidable proportions, impressive detail and manifest sophistication." 272 F. Supp. 226, 232 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969).

1. *Regulations for Noise Abatement.* The Administrator has promulgated extensive regulations to carry out his responsibilities in the field of noise abatement. See 14 C.F.R. § 91.87. These regulations have been promulgated under the 1958 Act's directive to prescribe air traffic regulations "for the protection of persons and property on the ground," 49 U.S.C. § 1348(c), and pursuant to the authority conferred by the 1968 amendment to "provide for the control and abatement of aircraft noise," 49 U.S.C. § 1431.

The noise abatement regulations of the Administrator embrace a wide range of flight techniques. For example, in the interest of alleviating noise disturbances to the residents of communities adjoining airports in metropolitan areas such as Hollywood-Burbank, the Administrator has established regulations that require jet aircraft to maintain an altitude of 1500 feet until further descent is required for a safe landing and, when taking off, to climb to 1500 feet as rapidly as practicable (F.F. 55, A. 392). The Administrator has also prescribed a variety of noise abatement runway use/procedures to

avert aircraft from residential areas (A. 200-01, 308-09).^{*} And where possible, the FAA has developed standard instrument departure procedures which are assigned between the hours of 11:00 p.m. and 7:00 a.m. in order to reduce noise over populated areas. Such standard departures are presently in effect at Los Angeles International Airport. (F.F. 57, A. 393.)

The FAA is also employing its noise abatement authority in the field of aircraft design and performance. On November 18, 1969, the Administrator adopted regulations prescribing noise standards which must be met as a condition to type certification for all new subsonic turbojet-powered aircraft. 34 Fed. Reg. 18355, now published at 14 C.F.R. Part 36. Under the "acoustical change" provision of these regulations, no currently certificated jet aircraft that exceeds the noise limits specified for new type designs may be modified to increase its noise over that of the parent airplane. On July 7, 1972, the Administrator issued a Notice of Proposed Rule-making that would require airplanes of older type design produced after July 1, 1973 to comply with these Part 36 noise standards. In issuing this notice, the Administrator announced his determination that further aggravation of the aircraft noise problem involved in the continued production of older aircraft types "conflicts with the longstanding policy of the FAA" and "counteracts the acoustic benefit available from the introduction of new technology aircraft." The Administrator pronounced this situation "unacceptable from an environmental management standpoint." 37 Fed. Reg. 14814.

^{*} The specific noise abatement order applicable at Hollywood-Burbank Airport was described in the Statement at page 13, *supra*, and will be discussed in the "conflict" section of this brief at pages 65-67, *infra*.

2. Regulation for Efficient Use of Navigable Airspace.

Especially pertinent to this case are the regulations adopted by the FAA in pursuit of the statutory goal of "efficient utilization" of airspace. 49 U.S.C. § 1348(a). The importance of this goal is heightened by the congestion of the navigable airspace in the vicinity of major air terminals, which at times results in FAA controllers "making use of all available airspace" in the Los Angeles area (A. 193). This condition exists in part because the services required by travelers and shippers frequently exceed the capacity of the nation's airport system (F.F. 48, A. 390). Congress recognized the emergence of this problem as early as 1958 when it referred to the national airspace as "a diminishing resource." S. REP. No. 1811, at 13.

One set of regulations to insure efficient use of navigable airspace involves centralized "flow control" procedures. Flow control is a means of metering aircraft to meet any given traffic situation. By means of flow control restrictions, the FAA regulates the number of aircraft that will be accepted in an area and restricts altitudes or routes that may be flown for specified periods of time. Thus, an FAA Air Route Traffic Control Center receiving a flow control restriction becomes obligated to (a) clear aircraft on specified routes; (b) establish separation in time, altitude or distance; or (c) limit the number of departures in a given period by holding aircraft on the ground. This situation can and does result in the Los Angeles Center holding aircraft on the ground at Hollywood-Burbank Airport. (F.F. 48-52, A. 390-91.)

The FAA has also promulgated high density traffic airport rules which work in conjunction with flow control procedures to provide relief at certain major airport terminals in the United States. 14 C.F.R. § 93.121-131.

The Administrator exercised his plenary authority in promulgating these rules to assure that the greatest number of persons would be efficiently transported during periods when IFR operations were in effect (R. 262). Pursuant to these rules, the hourly number of IFR operations (takeoffs and landings) is restricted to a specified number at certain airports designated by the FAA. These rules allocate varying numbers of IFR operations over the entire 24-hour period. (F.F. 53, A. 391.) And in allocating these IFR reservations, the Administrator specifically had in mind the noise disturbance that would result from encouraging the scheduling of more flights after 10:00 p.m. (F.F. 54, A. 392; A. 360.)

The validity of the high density traffic airport rules was challenged in *Aircraft Owners and Pilots Association v. Volpe*, Civil Action No. 927-69, United States District Court for the District of Columbia (unreported). (A transcript of the oral argument and of the court's decision appear at pages 208-68 of the Record on Appeal herein.) In that case District Judge Gesell upheld the high density regulation as a proper exercise of the "plenary authority" granted by the Act to the Administrator to insure "efficient utilization" of the airspace (R. 261-67).

D. The Noise Control Act of 1972.

On October 27, 1972, the President signed into law the Noise Control Act of 1972 ("1972 Act"), Pub. L. No. 92-574, 86 Stat. 1234. Aircraft noise is regulated by section 7 of the Act, which is set forth in Appendix A. As we shall show, this section constitutes a further assertion by the federal government of its dominance in the field of the abatement of aircraft noise.

1. *The New Statute.* Under section 7(a) of the 1972 Act, the Environmental Protection Agency ("EPA") is directed to conduct a comprehensive study of aircraft

noise problems, and report within nine months to the appropriate committees of Congress. This subsection provides:

"The Administrator [of EPA], after consultation with appropriate Federal, State, and local agencies and interested persons, shall conduct a study of the (1) adequacy of Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission standards on new and existing aircraft, together with recommendations on the retrofitting and phaseout of existing aircraft; (3) implications of identifying and achieving levels of cumulative noise exposure around airports; and (4) additional measures available to airport operators and local governments to control aircraft noise. He shall report on such study to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committees on Commerce and Public Works of the Senate within nine months after the date of the enactment of this Act." [7(a).]

After completing its nine-month study, EPA is directed to submit to the FAA proposed regulations for the control and abatement of aircraft noise. This direction is contained in section 7(b) of the Act, which amends section 611 of the Federal Aviation Act and reads in part as follows:

"Not earlier than the date of submission of the report required by section 7(a) of the Noise Control Act of 1972, EPA shall submit to the FAA proposed regulations to provide such control and abatement of aircraft noise and sonic boom (including control and abatement through the exercise of any of the FAA's regulatory authority over air commerce or transportation or over aircraft or airport opera-

tions) as EPA determines is necessary to protect the public health and welfare. . . ." [§ 611(c)(1).]*

The italicized reference in the above quotation to "the FAA's regulatory authority over air commerce or transportation or over aircraft or airport operations" is a notable confirmation that prior federal authority in this field extends to regulation of "airport operations." It is a legislative affirmation of the court of appeals' statement:

"Pursuant to 49 U.S.C. § 1431, the Administrator of the FAA, after consultation with the Secretary of Transportation, is to prescribe and amend such rules and regulations as he may find necessary to provide for the abatement of aircraft noise. Surely this does not mean abatement of noise of aircraft flying at or above 35,000 feet. That is not the kind of noise from which the public needs 'present and future relief and protection. . . .' The statute gives the Administrator power to deal with noise that is offensive to persons on the ground, including the noise created by low-flying aircraft, takeoffs and landings, *and the noise created by aircraft on the ground at airports.*" (A. 422.)

Under the new Act, the Administrator of the FAA retains final authority to prescribe or amend regulations for the control and abatement of aircraft noise [§ 611(b)]. And he is to issue such regulations after considering the recommendations of the EPA and in consultation with the Secretary of Transportation [§ 611(b), (c)(1)]. The regulations have as their statutory goal the protection of "the public health and welfare from aircraft noise and

* The remainder of new subsection (c) of § 611 sets up an elaborate procedure for the FAA's consideration of the EPA proposals. Appendix A, at 2-4.

sonic boom" [§ 611(b)(1), (c)(1)]. In issuing or amending these regulations, the Administrator is to consider the same factors as previously set forth in 49 U.S.C. § 1431(b) quoted above at pp. 30-31 [§ 611(d)].

2. *Legislative History of the 1972 Act.* A review of the congressional debates and reports on the Noise Control Act of 1972 shows a reaffirmation of the dominant role of the federal government in the field of aircraft noise abatement. The debates revolved primarily around the respective roles of the FAA and EPA. During the initial debate in the House on H.R. 11021, Representative Rogers, House Floor Manager of the bill, urged that the FAA be given the final authority for setting aircraft noise standards, and the bill passed the House in accordance with his position:

"The FAA should have final responsibility for setting aircraft noise standards because a comprehensive and detailed knowledge of aviation technology and flight operations is essential to setting achievable standards. . . .

"Final decision authority with respect to any standards affecting the aviation industry can realistically be vested only in an agency thoroughly knowledgeable of all possible impacts and consequences. The FAA is the only agency in Government which has such knowledge. The FAA is taking regulatory action as the state of the art will permit; its actions will be advised upon and oversighted by EPA. . . ."
118 Cong. Rec. H 1513 (daily ed. Feb. 29, 1972).*

In the Senate, the Public Works Committee reported out a bill (S. 3342) placing primary responsibility for

* All citations to the Congressional Record are to the daily edition.

promulgation of aircraft noise standards on the Administrator of the EPA. During its work on this bill, the Senate committee had considered an action-forcing plan which would have required an airport operator to adopt and submit for EPA approval a plan to achieve certain noise levels around airports. [S. 3342, § 502(a), Comm. Print. No. 6, June 14, 1972, *reprinted in* 118 Cong. Rec. S 17759-60 (Oct. 12, 1972).] However, this provision was abandoned by the committee in favor of the four-point provision for study and recommendation by EPA, as ultimately contained in section 7(a) of the 1972 Act. S. REP. No. 92-1160, 92d Cong., 2d Sess. 10 (1972) (hereafter "S. REP. No. 92-1160"); remarks of Senator Tunney, 118 Cong. Rec. S 17753 (Oct. 12, 1972).

The importance of the EPA study and its intended role in an orderly national program were stressed by Senate Manager Tunney. He emphasized that the EPA study and recommendation "is not merely an extension of the investigations on this subject performed by EPA as required by title IV of the Clean Air Act Amendments of 1970," but "it is an effort to deal comprehensively with" program for an urgent problem. *Id.* at S 17753.

The Senate version went back to the House on October 13, and the Senate and House versions were blended together into the form in which the legislation was ultimately enacted, with final authority to prescribe and amend noise abatement regulations being retained by the FAA. 118 Cong. Rec. H 10287-300 (Oct. 18, 1972). On October 17, there was a colloquy between Representative Staggers, Chairman of the House Commerce Committee, and Representative Springer, ranking Republican on the committee, in which they both pointed to the "chaos" resulting from the local regulation which would ensue

in the absence of federal action. *Id.* at H 10239 (Oct. 17, 1972). In urging the House to accept the amended version, Representative Staggers, Chairman of the House Commerce Committee, gave the following rationale for the bill:

"I cannot say what industry's intention may be, but I can say to the gentleman what my intention is in trying to get this bill passed. We have evidence that across America some cities and States are trying to do [sic] pass noise regulations. Certainly we do not want that to happen. It would harass industry and progress in America. That is the reason why I want to get this bill passed during this session."* 118 Cong. Rec. H 10294 (Oct. 18, 1972).

After the House approved the new version of H.R. 11021, Senator Tunney moved that the Senate concur. Making explicit the breadth of federal authority, he stated that the regulations to be considered by EPA, for recommendation to the FAA, would include:

"... proposed means of reducing noise in airport environments through the application of emission controls on aircraft, the regulation of flight patterns and aircraft and airport operations, and modifica-

* The context of Mr. Staggers' remarks is not entirely clear. He was engaged in a colloquy with Representative Hall who said he wanted "to be certain that the power of the FAA to regulate safety and noise-producing air transportation devices is maintained." 118 Cong. Rec. H 10294 (Oct. 18, 1972). Immediately following Mr. Staggers' remarks quoted above, Mr. Hall responded:

"And of course since it is interstate commerce, it comes from the gentleman's committee and it involves more than interstate commerce in many instances, since it involves aviation compacts and large jet airports, and so forth." *Id.*

tions in the number, frequency, or scheduling of flights [as well as] . . . the imposition of curfews on noisy airports, the imposition of flight path alterations in areas where noise was a problem, the imposition of noise emission standards on new and existing aircraft — with the expectation of a retrofit schedule to abate noise emissions from existing aircraft — the imposition of controls to increase the load factor on commercial flights, or other reductions in the joint use of airports, and such other procedures as may be determined useful and necessary to protect public health and welfare.” 118 Cong. Rec. S 18644 (Oct. 18, 1972).

Senator Tunney’s reference to the “imposition of curfews” leaves no doubt that this technique, like the other aspects of airspace management to which he referred, is within the scope of the federal scheme.

In his signing statement, the President explained his approval of the bill on the ground that “many of the most significant sources of noise move in interstate commerce and can be effectively regulated only at the federal level.” 8 Weekly Comp. of Pres. Docs. 1582, 1583 (Oct. 28, 1972). The President’s statement closely parallels the finding of Congress in section 2(a)(3) of the 1972 Act that “Federal action is essential to deal with major noise sources in commerce control of which require national uniformity of treatment.”

3. *Appellants’ Views on the New Act.* As indicated above, we believe that the Noise Control Act of 1972 strengthens the argument for federal preemption of the field involved here. Curiously, the views of the City of Burbank on the new Act seem diametrically opposed to those of the State of California as *amicus* in support of Burbank. Apparently referring to the rail and motor

carrier provisions, Burbank describes (Br. pp. 85-6) the Noise Control Act of 1972 as the "ultimate intrusion" into the state and local domain, and as part of an "insidious trend." Earlier in its brief (p. 22), Burbank states that the approach of Senate bill S. 3342 "held some promise of future relief," but failed to survive. And Burbank follows its discussion of the new Act by asking the Court to "reexamine the preemption and conflict doctrines as presently enunciated" (Br. pp. 85-86), thus demonstrating a plain though implicit recognition on Burbank's part that its curfew ordinance both conflicts with federal law and operates in an area preempted by the federal government.

On the other hand, the State of California in its supplemental *amicus* brief (pp. 4-16) purports to find support for Burbank's case in the legislative history because the bill ultimately enacted did not contain an express preemption provision which had appeared in the Senate bill. A closer look at this matter shows, however, that the history on this point in fact supports Lockheed's position.

The bill which initially passed the House on February 29, 1972 (H.R. 11021) was designed not to change the law with respect to federal preemption. The House Report accompanying H.R. 11021 [H.R. REP. No. 92-842, 92d Cong., 2d Sess. 10 (1972)] states:

"No provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill."

The Senate bill (S. 3342) which came from the Committee on Public Works contained the following provision as section 506:

"No State or political subdivision thereof may adopt or attempt to enforce any standard respecting noise emissions from any aircraft or engine thereof unless such standard is identical to a standard applicable to such aircraft under this part."^{*}

No similar provision was contained in the House bill.

Senate Report No. 92-1160 accompanying S. 3342 contained the following explanation of section 506:

"States and local governments are preempted from establishing or enforcing noise emission standards for aircraft unless such standards are identical to standards prescribed under this bill. This does not address responsibilities or powers of airport operators and no provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill." *Id.* at 10-11.

Senator Tunney, the Floor Manager of the bill, made a statement identical to the above quoted portion of the Senate Report in his remarks presenting the bill to the Senate. 118 Cong. Rec. S 17753 (Oct. 12, 1972).

On October 13, 1972, Senate Manager Tunney offered a perfecting amendment which modified section 506 to read as follows:

"No State or political subdivision thereof may adopt or enforce any standard respecting noise emis-

* Section 506 of the Senate bill was renumbered section 505 as the bill finally passed the Senate. 118 Cong. Rec. S 17989 (Oct. 13, 1972).

sions from any aircraft or engine thereof." 118 Cong. Rec. S 18013.

Senator Tunney gave the following explanation for the change:

"Section 506 is clarified to preclude States and localities from enacting identical standards. This added pressure was thought essential in the absence of a tough and effective regulatory program. However, requirements of section 501 and enforcement provisions in the legislation give sufficient tools to accomplish a tough and coordinated enforcement program on the Federal level. There was no intention in the committee bill to alter the relative powers of the Federal Government, State and local government, and airport operator, over the control of aircraft noise. This amendment would also retain the same powers for all parties." 118 Cong. Rec. S 17989 (Oct. 13, 1972).

It appears that the Senate Floor Manager and the Senate believed that they had stated the existing law and preserved the status quo when they provided that "no state or political subdivision thereof may adopt or enforce any standard respecting noise emissions from any aircraft or engine thereof." No other meaning can be fairly given to Senator Tunney's statement that the Committee bill did not intend "to alter the relative powers of the Federal Government, State and local government, and airport operator," and that the perfecting amendment would "retain the same powers for all parties." 118 Cong. Rec. S 17989 (Oct. 13, 1972).

Considered in that perspective, the omission of the preemption provision in the melding together of the House and Senate bills into the final version of the Act

does not have the meaning attributed to it by the State of California.* Since the preemption provision of the Senate bill was regarded as codifying existing law, neither its inclusion nor its ultimate omission was meant to change the law. What is significant is that the Senate believed that the preemption clause stated the existing law — and more broadly, that Congress reaffirmed the intensive federal control in this field.

E. The Tests for Federal Preemption Are Fully Met.

1. *Standards for Preemption.* In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), this Court stated, in the disjunctive, the classic tests for determining whether federal legislation has preempted a given field:

“[i] The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. [ii] Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforce-

* The State of California also asserts (Supp. Br. pp. 16-18) that the federal facilities compliance provision of the 1972 Act [§ 4(b)] requires federal agencies to comply with the Burbank curfew ordinance. Section 4(b) of the Act states that federal agencies “shall comply with Federal, State, interstate, and local requirements respecting control and abatement of environmental noise to the same extent that any person is subject to such requirements. . . .” The fallacy of California’s argument is that it assumes the validity of the ordinance in question. Obviously, section 4(b) of the Act requires only that federal facilities comply with valid local requirements.

Equally fruitless is California’s reliance (Supp. Br. pp. 16-17) on section 4(a) of the Act. Consistent with its authority under Federal laws, the FAA is required to balance concern for the environment with all the factors set forth in 49 U.S.C. §§ 1303 and 1431(b) in carrying out the programs under its control [§ 4(a)].

ment of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. [iii] Or the state policy may produce a result inconsistent with the objective of the federal statute." (Citations omitted.)

This Court has continued to apply and rely upon these three independent *Rice* tests in, for example, *Pennsylvania v. Nelson*, 350 U.S. 497, 502-09 (1956); *Campbell v. Hussey*, 368 U.S. 297, 302 (1961); and *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). There are of course situations such as those involved in *Head v. New Mexico Board*, 374 U.S. 424 (1963), and *California v. Zook*, 336 U.S. 725 (1949), cited by Burbank (Br. pp. 36-37), in which the tests for preemption have been held not to be satisfied. However, the standards prescribed by *Rice* certainly cannot be said to involve the "mechanical rules" which Burbank criticizes (Br. pp. 36-37). Indeed, the Court in *Rice* emphasized, as did the court below, the need for a careful scrutiny of the purpose of Congress and the scheme of federal regulation.

2. *Fulfillment of the Tests.* The federal regulatory scheme, summarized *supra* at pages 33-37, demonstrates a complete occupation of the fields of airspace management, and regulation of aircraft operations and aircraft noise. As both of the courts below held, each of the three tests for preemption laid down in the *Rice* case is independently met.

Applying the first *Rice* test, the district court found, and the court of appeals confirmed, that the federal scheme is so pervasive as to leave no room for localities such as Burbank to impose their own brand of regulation.

(F.F. 58, A. 393; C.L. 14, A. 404; A. 417.) The comprehensive federal authority contained in the Federal Aviation Act of 1958 was buttressed by the specific authority of the 1968 Aircraft Noise Abatement Amendment and, more recently, by the Noise Control Act of 1972. Taken together, the statutes indicate that Congress intended to confer "plenary" authority on the federal agencies to deal with airspace management, aircraft noise abatement, and aircraft operations.

Under the statutory directive to insure "the safety of aircraft and the efficient utilization" of the navigable airspace, 49 U.S.C. § 1348(a), and "to provide for the control and abatement of aircraft noise," 49 U.S.C. § 1431, the Administrator has promulgated regulations that are truly of "formidable proportions, impressive detail, and manifest sophistication" (C.L. 8, A. 403).

Noteworthy regulations in the field of airspace management are the high density traffic airport rules and the system of "flow control" (C.L. 9-10, A. 403). These regulations demonstrate that effective airspace management requires federal controls on the hours and times of operations at the nation's airports. The high density traffic airport rules affect airline scheduling by limiting, over the entire 24-hour period, the number of IFR operations at affected airports (F.F. 53, A. 391-92). And under the centralized flow control system, aircraft can be held on the ground at airports in order to reduce airborne delays and congestion (F. F. 51-52, A. 390-91).

Perhaps even more significant here are the FAA's aircraft noise abatement regulations, including (1) regulations regarding minimum altitudes and rate of climb, Finding 55, A. 392; (2) noise abatement runway orders, Finding 56, A. 392-93; (3) standard instrument depar-

tures to avoid residential areas, Finding 57, A. 393; (4) regulations regarding the noise characteristics of new aircraft and of modifications of existing aircraft, 14 C.F.R. Part 36; and (5) proposed rules to apply Part 36 noise standards to newly produced models of older type designs, 37 Fed. Reg. 14814. These regulations show a federal purpose to probe all feasible avenues to curb aircraft noise.

In sum, the federal statutes and regulations in the area of airspace management and aircraft noise abatement are so pervasive as to compel the conclusion that states and local governments may not superimpose on the federal scheme a limitation on the hours during which certificated air carriers may have access to the navigable airspace.

It is equally apparent that preemption has occurred within the meaning of the second *Rice* test, i.e., the act of Congress "touches a field" in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. (C.L. 15, A. 404; A. 417.) National rather than local control of interstate surface transportation has long been the policy of Congress (see *City of Chicago v. Atchison, Topeka & Santa Fe Railway*, 357 U.S. 77, 87 (1958)). Even more clearly established is the longstanding national interest in control by the federal government over all aspects of air transportation.

The authoritative Senate Report which accompanied the Federal Aviation Act of 1958 states that in adopting this Act Congress recognized that "aviation is unique among transportation industries in its relation to the Federal Government—it is the only one whose operations are conducted almost wholly within the Federal

jurisdiction, and are subject to little or no regulation by States or local authorities. Thus, the Federal Government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest. . . ." S. REP. No. 1811, at 5.

The evidence adduced in this case demonstrates that air transportation calls for regulation of an even more penetrating, uniform, and exclusive nature than is necessary for any other mode of transportation (F.F. 59, A. 394; C.L. 15, A. 404). Briefly summarized, this evidence shows that the national air transportation system involves a degree of complexity unknown to other forms of transportation. Each element of the system — the airport complex, the air traffic control system, and the aircraft fleet — is dependent upon and interacts with the other components (A. 257-59). Aircraft scheduling, for example, involves the intricate meshing of inter-connecting flights with aircraft maintenance and crew problems (A. 230-31, 260-62, 264-65). And each day a single aircraft may operate into and from many airports in several states while overflying many other political jurisdictions (A. 258).

Finally, application of the third *Rice* test — whether the local regulation would produce a result inconsistent with the objective of the federal law — makes it equally clear that the Burbank curfew ordinance must fall before the extensive federal legislation and regulations. Fulfillment of this test, which is closely related to the conflict issue, is clearly seen when the Burbank curfew ordinance is considered in light of the federal noise abatement provisions. The ordinance would make a nullity of the FAA noise reduction order which established a preferential runway system for departures from Hollywood-Burbank between 11:00 p.m. and 7:00 a.m. The ordinance would

thus be inconsistent with the responsibility of the FAA to determine the balance between the competing interests.

Moreover, enforcement of the Burbank ordinance would be inconsistent with the FAA's duty to secure the "efficient" as well as the safe use of airspace. The district court concluded that local imposition of curfews would cause a "very serious loss of efficiency," with the result that the statutory objective would be "compromised" (C.L. 16, A. 404). The scheduling of commercial aircraft flights is an almost incredibly complex operation, requiring maximum flexibility and expert use of the available time and space. As the Findings indicate, denial of ingress into the navigable airspace for one-third of the available hours would constitute a severe hindrance to the operation of the national air transportation system (F.F. 70-82, A. 397-400). In addition, the imposition of curfews would have the inevitable effect of increasing congestion in the remaining hours available (F.F. 78, A. 399).

The inconsistency of a local curfew ordinance with the federal objective is confirmed by previous FAA action in rejecting proposed air traffic rules which would have placed a limitation on the use of an air carrier airport between 10:00 p.m. and 7:00 a.m. In refusing to impose such a restriction at Los Angeles International Airport, the Administrator stated the following reasons:

"The practice of prohibiting the use of various airports during certain specific hours could create critically serious problems to all air transportation patterns. The network of airports throughout the United States and the constant availability of these airports are essential to the maintenance of a sound air transportation system. The continuing growth

of public acceptance of aviation as a major force in passenger transportation and the increasingly significant role of commercial aviation in the nation's economy are accomplishments which cannot be inhibited if the best interest of the public is to be served. It was concluded therefore that the extent of relief from the noise problem which this provision might have achieved would not have compensated the degree of restriction it would have imposed on domestic and foreign Air Commerce." 25 Fed. Reg. 1764-65 (Mar. 1, 1960).

F. Prior Decisions Support the Holding of Federal Preemption.

Earlier decisions in this and related fields support the holding of federal preemption. We will discuss first the aviation precedents in the lower federal courts and state courts, and then turn to the decisions of this Court in related fields.

1. **Lower Federal Decisions.** Closely in point is *American Airlines, Inc. v. City of Audubon Park, Kentucky*, 297 F. Supp. 207 (W.D. Ky. 1968), *aff'd*, 407 F.2d 1306 (6th Cir. 1969), *cert. denied*, 396 U.S. 845 (1969), where the court invalidated an ordinance making it unlawful to fly any aircraft over the corporate limits of the City of Audubon Park at a height of less than 750 feet. The court concluded that "the statutes enacted by the Congress clearly expressed an intent fully to preempt the field of law and regulation of interstate and foreign air traffic." 297 F. Supp. at 212. This holding was affirmed *per curiam* by the Sixth Circuit. 407 F.2d 1306 (1969).

Perhaps the most comprehensive discussion of the federal preemption issue prior to this case is contained in the district court's opinion in *American Airlines, Inc.*

v. Town of Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967), where the court held that the pattern of federal regulation invalidated the Town's ordinance seeking to regulate aircraft noise levels. The district court found that the ordinance operated to forbid noise only by forbidding flight, and, as such, operated in a preempted area. *Id.* at 230-31. The court said:

"It would be difficult to visualize a more comprehensive scheme of combined regulation, subsidization and operational participation than that which the Congress has provided in the field of aviation. . .

" . . .

"For present purposes it is enough to note that the FAA prepares and publishes approach procedures and standard instrument departures (SIDs) for Kennedy Airport which are provided to pilots and, taken with the elaborate flight manuals approved by the FAA and carried in each plane, *standardize every material element of a commercial airline take-off or landing including flight path, glide slope on landing and, within limits, climb-out procedure. Every such take-off and landing is a moving part in a vast complex of regional aircraft traffic control that involves transfer of aircraft from one FAA manned control center to another until the aircraft is safely landed on the runway or en route out of the area.* The web of federal airways and electronic navigational aids mapped on the airmen's charts is a record of the elaborateness, complexity and immediacy of the federal provisions of aids to and controls of air traffic. . . .

"The federal regulation of air navigation and air traffic is so complete that it leaves no room for such

local legislation as the Hempstead Ordinance. . . ."
Id. at 232-33.

The FAA prepares and publishes approach and departure procedures for Hollywood-Burbank Airport, just as in the case of Kennedy Airport (F.F. 43, A. 387; F.F. 46, A. 389). These procedures, taken together with the FAA approved flight manuals, "standardize every material element of a commercial airline takeoff" at Hollywood-Burbank Airport (F.F. 41-47, A. 386-89). As in the *Hempstead* case, these elaborate and complex federal regulations leave no room for local attempts such as that of the City of Burbank to intrude on the federal domain of airspace management.

In the *Hempstead* case, the district court also found that the ordinance of the Town of Hempstead was in conflict with the federal action in the area. After citing direct conflicts between FAA landing and takeoff procedures and the requirements of the ordinance, the court stated:

"The conflict, however, is also subtler. Local initiative in noise control of aviation is inherently an effort to regulate a consequence while disclaiming regulation of the cause. It cannot coexist with a comprehensive system of federal regulation of aircraft manufacture (through certificates of airworthiness) and federal regulation of air navigation and air traffic." *Id.* at 235.

On appeal, the decision of the district court was affirmed on conflict grounds. 398 F.2d 369 (2d Cir. 1968). This Court denied *certiorari*. 393 U.S. 1017 (1969).

A very recent illustration of federal supremacy in this field is *United States v. City of New Haven*, 447 F.2d 972 (2d Cir. 1971), which involved a dispute between the Town of East Haven and the City of New Haven as airport operator over acquisition by New Haven of land for use as a "clear zone" at the end of an extended runway. The runway had been extended pursuant to federal grant agreements between the airport and the FAA to facilitate the use of jet aircraft. Although the runway extension was within the City of New Haven, the City purchased 73 acres in East Haven as the "clear zone." The Connecticut Supreme Court ruled that New Haven had not obtained the land in East Haven in accordance with Connecticut law. It ordered New Haven to cease operating the runway at its extended length and thereby using the "clear zone" it had improperly acquired.

The United States obtained a preliminary injunction in the federal district court restraining the enforcement of the state court order and directing that East Haven move the Connecticut court for dissolution of its order. The court of appeals upheld the federal court injunction on the basis of the supremacy of federal control over use of the navigable airspace. The court said:

"Under the Federal Aviation Act of 1958 (49 U.S.C. § 1301 et seq. as amended) the United States has asserted that it possesses and exercises 'complete and exclusive national sovereignty in the airspace of the United States.' 49 U.S.C. § 1508(a). . . . State legislation purporting to deny access to navigable air space would therefore constitute a forbidden exertion of the power which the federal government as asserted." 447 F.2d at 973.

This result followed the pattern established in one of the earliest cases, *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 132 F. Supp. 871 (E.D.N.Y. 1955). There, the district court held that the comprehensive scheme of the 1938 Civil Aeronautics Act, the predecessor of the Federal Aviation Act of 1958, and the regulations adopted pursuant thereto, "have regulated air traffic in the navigable airspace in the interest of safety to such an extent as to constitute preemption in that field" 132 F. Supp. at 881. As a consequence, the court struck down an ordinance, enacted by a town adjacent to New York's Idlewild Field, prohibiting flights over the town at an altitude of less than 1000 feet. The court of appeals affirmed. 238 F.2d 812 (2d Cir. 1956).

Thus for some 17 years the district courts and courts of appeals have uniformly struck down local ordinances attempting to regulate aircraft operations or use of navigable airspace and, when asked, this Court has declined to review those decisions.

2. *State Court Decisions.* In the recent decision in *Opinion of the Justices*, ____ Mass. ____, 271 N.E. 2d 354 (1971), the highest court in Massachusetts held invalid proposed legislation which would prevent non-conforming supersonic airplanes from landing or taking off anywhere in Massachusetts if the noise they emitted exceeded a specified level. The justices found the proposed law, which was based upon police power and not proprietary power, invalid under the Supremacy Clause:

"[T]he principles expressed in that [*Hempstead*] case and the comprehensive character of the Federal air statutes and regulations, existing even prior to 1968, lead us to conclude that the proposed Massa-

chusetts legislation would intrude upon an area preempted by the Congress." 271 N.E. 2d at 358.

The lower state court cases of *Stagg v. Municipal Court*, 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (1969), and *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 A.2d 692 (1969), cited by Burbank (Br. p. 32) are inapposite.

Stagg involved a curfew regulation adopted by the proprietor of the Santa Monica Municipal Airport, which serves no scheduled commercial air traffic. Therefore, that case is not analogous to the attempt of Burbank to regulate with its police power an airport which it neither owns nor operates and where there are scheduled interstate and intrastate operations. Moreover, the *Stagg* decision was rendered without any consideration of the important 1968 Amendment to the Federal Aviation Act, 49 U.S.C. § 1431, the accompanying legislative history, or any of the recent noise control measures taken by the FAA.

The case of *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 A.2d 692 (1969) (cited by Burbank at Br. pp. 32, 60, 77), appears also to have been decided without considering the 1968 Amendment to the Act and the accompanying regulatory developments. In that case the trial court was asked to enjoin a planned expansion of a small, noncommercial airport and certain operational features of that airport. It did issue an "experimental" injunctive order requiring a jet curfew, after finding no preemption by the federal government, at least where no scheduled, certificated carriers were involved. 261 A.2d at 701. However, on July 17, 1972 the United States filed an action in the federal court in New Jersey to compel the dissolution of the state court-imposed cur-

few. United States v. Town of Morristown, Civil No. 1214-72, D.N.J.*

And of course both the *Stagg* and *Morristown* cases were decided before passage of the important Noise Control Act of 1972, Pub. L. No. 92-574 (Oct. 27, 1972), which reaffirmed the intensive federal control over aircraft noise abatement.

As it did in the court of appeals, Burbank has attempted to supplement the record in this case by appending and relying upon the FAA's response to the *Petition of Jordan A. Dreifus*. (Br. p. 41, *et seq.*; App. to Br. p. 4.) That petition, which was turned down by the FAA, requested the federal government to impose a night curfew at the Santa Monica Airport. The FAA's response in *Dreifus* relied heavily on the fact that the City of Santa Monica is the proprietor of the Santa Monica Airport, a circumstance to be contrasted with the fact that Burbank is not the proprietor of Hollywood-Burbank Airport. And it is Lockheed, not Burbank, that is regulated by the terms of the airport operating certificate issued by the Administrator of the FAA pursuant to 49 U.S.C. § 1432(a). Moreover, as indicated in the discussion of the *Stagg* case, Santa Monica is a general aviation airport with no scheduled operations, whereas Hollywood-

* In *Loma Portal Civic Club v. American Airlines, Inc.*, 61 Cal.2d 582, 39 Cal. Rptr. 708 (1964) (cited by Burbank at Br. pp. 35, 50), plaintiffs failed in their efforts to enjoin certain commercial jet flight operations. Although the court declined to find federal preemption of "all aspects" of air transportation (61 Cal. 2d at 591-92, 39 Cal. Rptr. at 614), the decision preceded the important 1968 amendment to the Federal Aviation Act, 49 U.S.C. § 1431, and the subsequent FAA noise control regulations. A similar request for injunctive relief was denied in *Virginians for Dulles v. Volpe*, 344 F. Supp. 573 (E.D. Va. 1972), *appeal pending*.

Burbank Airport is a key satellite airport with scheduled interstate and intrastate operations serving more than one million passengers annually.

Most significant, however, are the comments of the FAA on *Dreifus* which are contained in the FAA's *amicus* brief in the court of appeals. After pointing out the distinctions discussed above between the Santa Monica and the Hollywood-Burbank situations, the FAA's brief states:

"It is important to bear in mind that the *Dreifus* opinion stemmed from a request for Federal regulatory action of a type which the FAA considered as not being appropriate. (Appendix to Brief of Appellants at 12.) The FAA in the *Dreifus* opinion did not endorse the Santa Monica type curfew ordinance or intend by its action to encourage a multiplication of such restrictions on airport use by state and local governments, whether or not they acted as proprietors. . . . The FAA filed its brief *amicus curiae* in this case because it realizes that the proliferation of this type of local ordinance would stagnate and destroy the national air transportation system." FAA Brief in Court of Appeals at 25.

3. *The Supreme Court Precedents.* The decisions of this Court referred to by Burbank are not inconsistent with the decision below. The case of *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (cited by Burbank at Br. pp. 47-48), is distinguishable on the grounds stated by the Ninth Circuit:

"There, Detroit was allowed to apply its Smoke Abatement Code to a vessel which had federally inspected and approved boilers. The Court found that the purpose of the federal inspection laws was

'clearly limited to affording protection from the perils of maritime navigation.' *Id.* at 445. On the other hand, the purpose of the city regulation was the control of air pollution for the health and welfare of its inhabitants. *Id.* at 442. Since these purposes were not conflicting and there was no overlap of scope between them, there was no preemption. . . ." (A. 419.)

In contrast to the situation in *Huron*, here, said the court of appeals, Congress has vested the FAA with the responsibility and authority to balance "considerations of safety, efficiency, technological progress, common defense and environmental protection in the process of formulating rules and regulations with respect to the use of the nation's airspace" (A. 419). This balancing process was demonstrated in the FAA's refusal to impose restrictions on the use of Los Angeles International Airport between 10 p.m. and 7 a.m. On that occasion the Administrator concluded that the extent of relief from the noise problem achieved by such a limitation "would not have compensated the degree of restriction it would have imposed on domestic and foreign Air Commerce." 25 Fed. Reg. 1765 (Mar. 1, 1960).

Moreover, the FAA's authority and responsibility to balance the safe and efficient use of the nation's airspace with environmental considerations, which was emphasized by the Ninth Circuit, has subsequently been underscored by the passage of the Noise Control Act of 1972. Under the new Act the Administrator of the FAA is vested with the final authority to prescribe regulations for the control and abatement of aircraft noise [§ 611(b)]. And he is to issue such regulations after considering the recommendations of the Environmental Protection Agency [§ 611(b),(c)(1)]. This regulatory process has

as its statutory goal the protection of the "public health and welfare [§ 611(b)(1), (c)(1)]. As noted by the Ninth Circuit, the delicate balance achieved by the FAA "under the aegis of federal law" should not and must not be upset by local regulation which is overprotective of one of the multiple values balanced in the national interest (A. 419).

There is no merit to Burbank's contention (Br. pp. 71-73) that federal preemption of aircraft noise regulation somehow requires a reversal of this Court's opinion in *Griggs v. Allegheny County*, 369 U.S. 84 (1962). The *Griggs* case held that because the airport proprietor determines the location of the airport and its runways, it is liable if flights to or from the airport are found to constitute a "taking" under the Fifth and Fourteenth Amendments.* However, Burbank could not incur the kind of liability imposed in *Griggs* because it is not the airport operator. In any event, the *Griggs* case involved totally different issues than the invalidation of Burbank's attempt to use its police power to regulate aircraft operations and aircraft noise.

Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963), cited by Burbank (Br. pp. 44, 82), is also inapplicable. There the Court held that the Federal Aviation Act does not express an intention to preempt state anti-discrimination legislation. The Court, assuming that the Civil Aeronautics Board had power to bar racial discrimination with respect to customers and employees, found that the enforcement of a Colorado statute to bar racial discrimination in hiring

* Burbank also concedes (Br. p. 73), as it must, that no Fifth Amendment "taking" is presented by this case. See A. 41, 55. Nor are the Ninth and Tenth Amendments, which Burbank would belatedly invoke, involved. *Id.*; see *Virginians for Dulles v. Volpe*, 344 F. Supp. 573, 578-79 (E.D. Va. 1972), appeal pending.

by air carriers did not frustrate the purpose of the federal legislation "at least so long as any power the Civil Aeronautics Board may have remains 'dormant and unexercised.' . . ." 372 U.S. at 724 (footnote omitted). The Court noted that a different situation would be presented "if the federal authorities seek to deal with discrimination in hiring practices and their power to do so is upheld." *Id.* at 724 n.22. In the instant case the FAA clearly has the power to act in the area in question, and has done so through its regulation of airspace management and aircraft noise, as summarized at pp. 10-14, 33-37, *supra*.

Equally inapposite are cases such as *Braniff Airways v. Nebraska State Board*, 347 U.S. 590 (1954) (cited by Burbank at Br. pp. 33-34), where the Court found that state power to tax aircraft had not been preempted by the predecessor of the Federal Aviation Act of 1958. The court below did not find that the federal government has preempted every conceivable aspect of aviation. The preemption in question relates to the management of airspace and the regulation of aircraft operations and aircraft noise. It is the attempted invasion of those specific areas which invalidated the Burbank ordinance.*

Head v. New Mexico Board, 374 U.S. 424 (1963) (cited by Burbank at Br. pp. 35-36), simply held that the nature of the regulatory power given the FCC was not sufficient to indicate a congressional intention to preempt all the detailed state regulation of professional advertising prac-

* Similarly, the preemption holding of the court below is not inconsistent with this Court's ruling in *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), that the federal statutes do not evidence a congressional purpose to preempt state power to levy charges designed to help defray the costs of airport construction and maintenance. *Id.* at 721. The preemption here relied upon does not extend to that revenue raising area.

tices, "particularly when the grant of power to the Commission was accompanied by no substantive standard other than the 'public interest, convenience, and necessity.'" 374 U.S. at 431. That case is not analogous to the present situation where the FAA, guided by carefully articulated statutory standards, has adopted comprehensive regulations governing aircraft operations, the use of the navigable airspace and aircraft noise.

Rice v. Chicago Board of Trade, 331 U.S. 247 (1947) (cited by Burbank at Br. pp. 48-49), was a companion case to *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, which was relied upon by the court below as setting forth the standards by which preemption is to be determined. *Board of Trade* considered the preemption aspects of a different statute, and the Court merely determined that the Commodity Exchange Act, unlike the United States Warehouse Act considered in *Santa Fe Elevator*, did not evidence a congressional intent to make its regulatory features exclusive in the area. This decision is completely in accord with the ruling below.

II. THE BURBANK CURFEW ORDINANCE IS IN CONFLICT WITH FEDERAL LAW.

Even absent federal preemption of an area, a local ordinance which has the effect of bringing local and federal policies directly into conflict must bow to the supremacy of national enactments. See, e.g., *Perez v. Campbell*, 402 U.S. 637, 649 (1971); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230-31 (1964). The test for the existence of such a "conflict" was stated in *Perez* as follows:

"Three decades ago MR. JUSTICE BLACK, after reviewing the precedents, wrote in a similar vein that, while '[t]his Court, in considering the validity of

state laws in the light of treaties or federal laws touching the same subject, ha[d] made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference[,] . . . [i]n the final analysis, 'our function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)." 402 U.S. at 649.

As we shall show, the Burbank ordinance stands as an obstacle to the accomplishment of the full purposes and objectives of Congress in several respects.

A. The Curfew Ordinance Conflicts With the FAA Nighttime Noise Abatement Order.

Prior to enactment of the Burbank curfew ordinance, the FAA took in hand the subject of nighttime takeoffs at Hollywood-Burbank Airport and acted to minimize the consequences of those operations by issuing the noise abatement order summarized in Finding 56 (A. 392). This order (BUR 7100.5B), which was issued by the FAA Chief of the Burbank Air Traffic Control Tower, establishes a preferential runway for departures of jet aircraft between the hours of 11:00 p.m. and 7:00 a.m. In issuing this order the responsible federal official announced his determination that the noise abatement procedures which it established were "designed to reduce community exposure to noise to the lowest practicable minimum" (PX 30, A. 454).

The court of appeals held that the Burbank ordinance is invalid because of the "conflict" between the ordinance and the FAA's order:

"This assertion represents a considered determination by an authorized representative of the FAA that measures of the magnitude of that taken by the City of Burbank are beneath 'the lowest practicable minimum.' The municipal curfew ordinance, therefore, interferes with the balance set by the FAA among the interests with which it is empowered to deal, and frustrates the full accomplishment of the goals of Congress. . . ." (A. 426-27). (Footnote omitted.)

Burbank has attempted to minimize the importance of this conflict by referring to the FAA's order as "non-mandatory" (Br. pp. 51, 52). The record is to the contrary. Based upon testimony of the Burbank Airport Tower Chief,* the trial judge found that in accordance with this order, "the preferential runway is assigned by the FAA control tower [between 11:00 p.m. and 7:00 a.m.] by incorporation into an aircraft's departure clearance as an instruction to the pilot" (F.F. 56, A. 393). And any person violating an air traffic control clearance or instruction is subject to a civil penalty and to suspension or revocation of his airman's certificate. *See* 49 U.S.C. §§ 1429, 1430(a)(5), 1471; 14 C.F.R. § 91.75. The testimony showed that the preferential runway established by the order was used except for a "few occasions" when the control tower permitted deviation because of unusual weather or operating conditions affecting safety. A. 318, 322-23.

* Burbank's effort to diminish the order by labelling the Tower Chief as "a minor FAA official" (Br. p.18) is answered by the Ninth Circuit's observation:

"No question is raised as to the authority of the Chief of the Tower to issue this order, nor is there doubt as to its official character." (A. 428.)

Burbank also tries to discount the FAA's nighttime noise abatement order at Burbank by contending (Br. pp. 41-43) that the *Dreifus* opinion indicated FAA approval of the curfew technique. As pointed out above, the *Dreifus* opinion related to the possible imposition of a curfew by an airport proprietor at a general aviation airport with no federally certificated, scheduled air carrier operations. The most recent expression of the FAA on this subject is contained in its *amicus* brief in the court of appeals, where the FAA states (p. 25) that in *Dreifus* it "did not endorse the Santa Monica type curfew ordinance or intend by its action to encourage a multiplication of such restrictions on airport use by state and local governments, whether or not they acted as proprietors."

Nothing suggested by Burbank can gainsay the fact that the ordinance would make the FAA order a nullity and go beyond the noise abatement measures determined by the FAA to constitute "the lowest practicable minimum." In doing so, the ordinance "interferes with the balance set by the FAA among the interests with which it is empowered to deal, and frustrates the full accomplishment of the goals of Congress" (A. 426-27).*

* The State of California as *amicus* seeks to uphold the Burbank ordinance by making the unsupported assertion that the curfew serves to implement national environmental policy (Br. p. 17). However, the trial court found on the basis of uncontradicted evidence that curfew ordinances would actually aggravate, not relieve, the noise problem by causing a bunching of flights in the hours immediately preceding the curfew — the period of greatest annoyance to surrounding communities. This result, said the court, "is totally inconsistent with the objectives of the federal statutory and regulatory scheme" (F.F. 78, A. 399). Moreover, as the court of appeals held, the general commitment of environmental problems to local regulation under section 202(b) of the Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371(b), does not "overcome the preemptive nature of Congress' particular commitment of air commerce problems to the federal domain" (A. 424).

B. The Curfew Ordinance Interferes With the Use of Navigable Airspace.

The court of appeals recognized a second ground of conflict between the Burbank curfew and federal law. Under the Federal Aviation Act, the United States is declared "to possess and exercise complete and exclusive national sovereignty in the airspace of the United States." 49 U.S.C. § 1508(a). The Act declares that "there is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." 49 U.S.C. § 1304. The circuit court held that "the effect of the curfew was to terminate the right of flight of prospective passengers" through a portion of the airspace for one-third of the hours of every day (A. 427 n.12).^{*} This holding is clearly in accord with this Court's recognition that such local prohibition of a federally guaranteed right must fall before the Supremacy Clause. *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 385 (1963).

It provides no answer to this conflict point for Burbank to argue that only 80 passengers were boarding the flight terminated by the curfew. If local power to enforce such an ordinance were upheld, Burbank could increase dramatically the number of passengers affected by simply extending the period of its curfew.

^{*} Burbank attempts to refute this conflict point with unproven assertions regarding "severe noise pollution" (Br. pp. 58-59). Not only is there no evidence in the record to support these claims, but Burbank explicitly represented to the trial judge that "the noise created by these airport pure jet operations [is] irrelevant and immaterial." R. Tr. 434, 436. Burbank made no attempt at trial to introduce the hearsay noise study it would now rely upon (Br. p. 59 n.87). Since Burbank had tentatively designated this report as one of its exhibits (R. 68) and the author as one of its witnesses (R. 69), it is apparent that Burbank deliberately chose not to test this evidence before the trier of fact.

C. The Curfew Ordinance Restricts Federally Certificated Rights.

The district court found and concluded that the Burbank ordinance conflicts with the federally certificated rights and obligations of air carriers and is therefore void under the Supremacy Clause (F.F. 82, A. 400; C.L. 17, A. 404). This holding is spelled out in Conclusion of Law 17:

"Each federally certificated air carrier is authorized and obligated by statute and by its Certificate of Public Convenience and Necessity to provide adequate service over its specified routes. Certificates of Public Convenience and Necessity held by the interstate air carriers cannot be revoked unless the carrier fails to comply with an order of the CAB requiring obedience to a federal rule found to have been violated. [49 U.S.C. § 1371(g)] The Burbank curfew ordinance, by imposing a local veto for a period of hours over use of the navigable airspace, constitutes a restriction on carriers in fulfilling their statutory duty and is tantamount to a partial suspension of the Certificates of Public Convenience and Necessity issued to interstate air carriers operating out of Hollywood-Burbank Airport. Said ordinance is therefore in direct conflict with federal law and is void under the Supremacy Clause (Art. VI, Para. 2) of the United States Constitution." (A. 404-05.)

The testimony and conclusion that the Burbank ordinance constitutes a restriction on federally conferred rights brings this case squarely with *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954). There the Court held that where an interstate motor carrier holds a Certificate of Convenience and Necessity issued by the

Interstate Commerce Commission under the Federal Motor Carrier Act, the federal Supremacy Clause prevents a state from suspending the carrier's right to use the state's highways in its interstate operations as punishment for repeated violations of state highway regulations. In the present case, it is equally clear that the Burbank ban on jet takeoffs is a restriction on the interstate air carriers which operate at Hollywood-Burbank Airport and is tantamount to a partial suspension of their Certificates of Public Convenience and Necessity.

Burbank attempts to minimize this conflict by asserting (Br. p. 53) that certificates of public convenience and necessity issued to air carriers under 49 U.S.C. § 1371 merely authorize the carrier to engage in air transportation. But it is precisely this federal authorization that Burbank seeks to negate by local ordinance. Moreover, the carriers are required by their certificates to provide "adequate service," 49 U.S.C. § 1374(a), which early in the jet age was held to require service by jet aircraft. *See Fort Worth Investigation*, 31 CAB Rpt. 803 (1960).

Burbank also argues (Br. p. 54) that "local airport authorities" must be persuaded to accept the service authorized by the CAB. But Burbank is not the local airport authority. That position belongs to the appellee Lockheed. Moreover, Burbank had an opportunity to advise the CAB of its views at the time additional service at Hollywood-Burbank Airport was being considered. And Burbank advised the Board as follows:

"What we are interested in is gaining service at Hollywood-Burbank Airport for the citizens of the City of Burbank and the more than two and one-

half million residents of Los Angeles County who find Hollywood-Burbank Airport more conveniently accessible than the over-crowded facilities at the Los Angeles International Airport. We therefore urge that the applications of any carrier or carriers who are ready, willing and able to provide service at Hollywood-Burbank Airport to and from points in the Pacific Northwest and in particular, Portland, Oregon and Seattle, Washington, be heard and considered." (PX 36, A. 476-77.)

The Board has issued its certificate of public convenience and necessity authorizing the service requested by Burbank. The local ordinance which would restrict this federally certificated right must fall before the Supremacy Clause.

III. THE BURBANK CURFEW ORDINANCE VIOLATES THE COMMERCE CLAUSE.

The Commerce Clause, Article I, section 8, clause 3, confers upon Congress the power to regulate interstate and foreign commerce. We have summarized above the comprehensive legislation, enacted pursuant to this power, to deal with airspace management, aircraft operations and aircraft noise abatement. Even without such congressional action, however, the Commerce Clause protects the national commerce from hostile actions of state or local governments. And it has been so held for over a century. See *Southern Pacific Company v. Arizona*, 325 U.S. 761, 769 (1945); *Morgan v. Virginia*, 328 U.S. 373, 378-79 (1946).

The Court in *Southern Pacific* restated the settled tests for determining whether a local regulation is invalidated by the Commerce Clause.

"[E]ver since *Gibbons v. Ogden*, 9 Wheat. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." 325 U.S. at 767 (footnote omitted).

When a local law is challenged as invalid under the Commerce Clause, it is the responsibility of the court to weigh competing national and local interests to determine whether the local law substantially (1) impedes the free flow of commerce or (2) operates in an area where regulation should be prescribed by a single authority. See, e.g., *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768-69 (1945), and cases cited.* In making both these determinations, the Court should not regard the local regulation as an isolated phenomenon but should consider the effect if similar regulations were enacted throughout the United States. Consideration of the national effect is especially important where a local regulation might impose inconsistent requirements upon interstate carriers so as to interfere with the efficient use of the channels of commerce. See, e.g., *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 526-27 (1959); *Morgan v. Virginia*, 328 U.S. 373 (1946); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945).

* Burbank's reliance upon *Barnwell* (Br. p. 65) for the proposition that only Congress can determine whether a phase of commerce requires regulation by a single authority is refuted elsewhere in that very case. See *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 184-86 (1938). There the Court recognized that absent any congressional action, the Commerce Clause of its own force will void local regulation hostile to interstate commerce.

If it appears that a local law is violative of the Commerce Clause, the fact that it was passed in the exercise of the police power will not save it.

"The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power.'" *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 779-80 (1945).

The district court, applying the above standards, found the Burbank curfew to run afoul of the Commerce Clause (C.L. 19-21, A. 405-06).^{*} The trial judge's conclusions are clearly correct and are supported by uncontradicted evidence, as the following will demonstrate.

A. The District Court Properly Found That a Single Authority Is Required for Airspace Management and Regulation of Aircraft Operations and Aircraft Noise.

Whether a local law, in the words of one of the *Southern Pacific* tests, regulates one of "those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority" is a determination that requires evaluation of the nature of the phase of commerce involved and the practical effect of the challenged regulation. Only in this way can a court appraise whether the subject area is one where uniformity of regulation is

^{*} As previously indicated, the court of appeals ruled that the Supremacy Clause issues were dispositive and limited its opinion to those issues (A. 414). The district court held the Burbank curfew ordinance invalid under both the Supremacy and Commerce Clauses.

necessary to assure the efficient and free flow of national commerce. *Kelly v. Washington*, 302 U.S. 1, 9 (1937).

After considering the evidence before him, the district court ruled in its memorandum opinion as follows:

"There is no conflict in the evidence adduced in this case and it should be concluded that air commerce, by reason of its speed and volume, requires a single authority in control if it is to be conducted at maximum safety and efficient use of the navigable airspace.

"The evidence discloses that air traffic is unique and should be controlled on the national level."
(A. 368.)

The court reiterated this view in Conclusion of Law 21:

"The volume of air commerce, the speed with which it is conducted, the technical complexity of its scheduling and operation, and the limited availability of such of its essential aspects as airports, aircraft, air traffic routes, and aircraft maintenance facilities all make national uniformity of regulations prescribed by a single authority a necessity, so that this phase of the national commerce may be conducted with maximum safety and so as to achieve efficient use of the navigable airspace." (A. 406.)

The national character of air transportation which demands regulation by a single authority is vividly demonstrated by the centralized flow control system and high density traffic airport rules established by the FAA. See F.F. 48-54, A. 390-92. The trial court also considered evidence of the complexity of national aircraft flight operations (F.F. 41-47, A. 386-89) as well as testimony regarding the intricate and complex problems of schedul-

ing and maintenance of air carrier aircraft (F.F. 75-76, A. 398).

The need for centralized management of the navigable airspace is also shown by considering the confusing, even chaotic, effect of permitting regulation by the conflicting political jurisdictions that surround and interact upon many major airports in the United States. The testimony of the former head of the Civil Aeronautics Administration depicted a number of these potentially hazardous situations (A. 292-93). Another instance of conflicting local regulation which interrupted airport operations was dealt with by the Second Circuit in *United States v. City of New Haven*, 447 F.2d 972 (2d Cir. 1971). And in this case the evidence shows that a portion of the Hollywood-Burbank Airport lies within the cities of Los Angeles and Burbank and portions of its runways are owned by the federal government (F.F. 6, A. 377).

Indeed, the need for centralized regulation is highlighted by the geographical area served by the Hollywood-Burbank Airport: the majority of passengers desiring to depart from the Airport within curfew hours are probably not Burbank residents. Such "extraterritorial effects" of state and local statutes have always played an influential role in persuading this Court to invalidate local regulations. See *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767-68 n.2 (1945); *Edwards v. California*, 314 U.S. 160, 174 (1941).

Other decisions recognizing that regulation of air transportation must come from a single source if the flow of commerce is not to be impaired are *American Airlines, Inc. v. City of Audubon Park*, 297 F. Supp. 207 (W.D. Ky. 1968), *aff'd*, 407 F.2d 1306 (6th Cir.), *cert. denied*, 396 U.S. 845 (1969); *American Airlines, Inc. v. Town of*

Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd* without reaching commerce clause issue, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969); and *All American Airways, Inc. v. Village of Cedarhurst*, 106 F. Supp. 521 (E.D.N.Y. 1952), *aff'd*, 201 F.2d 273 (2d Cir. 1953).

In sum, the Burbank curfew ordinance, particularly when viewed in the light of its natural tendency to induce a proliferation of similar restrictions, surely operates in one of those areas which "demand that their regulation, if any, be prescribed by a single authority." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945). Local attempts to restrict airports so integrally connected with interstate commerce for one-third of the available hours every day would hobble the nation's airport and airway system. Such a result would be especially undesirable because the system, to borrow from the Congressional declaration of policy in the Airport and Airway Development Act of 1970, 49 U.S.C. § 1701, already "is inadequate to meet the current and projected growth in aviation" and requires "substantial expansion and improvement . . . to meet the demands of interstate commerce"

B. The District Court Properly Found the Burbank Ordinance To Impede Substantially the Free Flow of Interstate Commerce.

The district court also evaluated the Burbank curfew under the other *Southern Pacific* test: whether the regulation impedes substantially the free flow of interstate commerce. The court concluded that:

"The nationwide imposition of ordinances such as Burbank's would seriously interrupt the carriage of interstate passengers, mail, and goods and thereby

substantially impede the free flow of commerce from state to state, and, considered on such a national basis, such ordinances could not stand." (C.L. 20, A. 405.)

The trial court was entirely correct in holding that under the Commerce Clause, an ordinance such as Burbank's cannot be considered "solely in the accident of its particular circumstances but must be weighed and tested as if imposed on a nation-wide basis" (C.L. 13, A. 404). See, e.g., *Hood & Sons v. DuMond*, 336 U.S. 525, 538-39 (1949); *Mississippi Railroad Comm'n v. Illinois Central R.R.*, 203 U.S. 335 (1906); *Minnesota v. Barber*, 136 U.S., 313, 321 (1890), and cases cited *supra* page 72. The same approach was taken by the district court in *American Airlines, Inc. v. Town of Hempstead*, 297 F. Supp. 226, 231 (E.D.N.Y. 1967), *aff'd on other grounds*, 398 F.2d 369 (2d. Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969), in considering the constitutionality of a local law regulating the flight of aircraft.*

Findings of Fact 67 through 82 detail the "near catastrophic effect" that ordinances such as Burbank's would impose on interstate commerce (F.F. 70, A. 396). For example, scheduling would be drastically upset, with the departures of flights between widely separated cities limited in some cases to less than one-third of the available hours of the day (F.F. 68, A. 396). Continental Air Lines alone would have to cancel over 48 flights per day (F.F. 71, A. 397), and its operating costs would be increased by approximately 25 percent (F.F. 72, A. 397). Other carriers would be similarly affected (F.F. 73, A. 397).

* In addition, testing the ordinance as if imposed on a national basis was warranted by the uncontradicted testimony, A. 276, 284-85, that these ordinances, if upheld, would proliferate and be adopted by virtually all cities surrounding airports. See F.F. 69, A. 396.

Each day, some 1,009 scheduled departures occur throughout the country between 11:00 p.m. and 7:00 a.m., and all of these flights would have to be cancelled (F.F. 74, A. 397). Because over 48 percent of the nation's air mail is carried during curfew hours, billions of pieces of mail annually would be delayed at least one day in delivery (F.F. 79, A. 399). The air cargo industry exists upon its ability to operate during curfew hours, and the required cancellation of these all-cargo services would have a drastic impact upon the nation's business community (F.F. 80-81, A. 399-400).

In sum, the findings show that the imposition of curfew ordinances on a nationwide basis would (1) drastically restrict the hours available for flight scheduling far beyond the curfew period, (2) severely impair the efficiency of the maintenance system, (3) require extensive rescheduling at enormous inconvenience and expense, (4) deteriorate air transportation service to the public, (5) increase the already serious congestion problem, (6) intensify the noise problem in the hours immediately preceding the curfew, which is the period of greatest annoyance to surrounding communities, and (7) delay billions of pieces of mail and air freight annually with resulting drastic effect upon the business community. (F.F. 67-68, 70-82, A. 396-400.)

These massive disruptions in the national air transport system clearly constitute an unreasonable burden on interstate commerce and impede substantially its free flow. The effects of curfew laws would be far more destructive of the free flow of commerce than those which have caused the Supreme Court to strike down earlier local regulatory enactments. *See, e.g., Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) (regulating the length of railroad trains passing through the state); *Railroad*

Company v. Husen, 95 U.S. 465 (1877) (prohibiting the conveyance of specified types of cattle into the state between March and November of each year); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (prescribing specialized equipment on trucks passing through the state).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

Noise Control Act of 1972

Public Law 92-574, 86 Stat. 1234

92nd Congress, H. R. 11021

October 27, 1972

AIRCRAFT NOISE STANDARDS

SEC. 7. (a) The Administrator, after consultation with appropriate Federal, State, and local agencies and interested persons, shall conduct a study of the (1) adequacy of Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission standards on new and existing aircraft, together with recommendations on the retrofitting and phaseout of existing aircraft; (3) implications of identifying and achieving levels of cumulative noise exposure around airports; and (4) additional measures available to airport operators and local governments to control aircraft noise. He shall report on such study to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committees on Commerce and Public Works of the Senate within nine months after the date of the enactment of this Act.

(b) Section 611 of the Federal Aviation Act of 1958 (49 U.S.C. 1431) is amended to read as follows:

"CONTROL AND ABATEMENT OF AIRCRAFT NOISE AND SONIC BOOM

"SEC. 611. (a) For purposes of this section:

"(1) The term 'FAA' means Administrator of the Federal Aviation Administration.

(2)

"(2) The term 'EPA' means the Administrator of the Environmental Protection Agency.

"(b)(1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title. No exemption with respect to any standard or regulation under this section may be granted under any provision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted.

"(2) The FAA shall not issue an original type certificate under section 603(a) of this Act for any aircraft for which substantial noise abatement can be achieved by prescribing standards and regulations in accordance with this section, unless he shall have prescribed standards and regulations in accordance with this section which apply to such aircraft and which protect the public from aircraft noise and sonic boom, consistent with the considerations listed in subsection (d).

"(c)(1) Not earlier than the date of submission of the report required by section 7(a) of the Noise Control Act of 1972, EPA shall submit to the FAA proposed regula-

tions to provide such control and abatement of aircraft noise and sonic boom (including control and abatement through the exercise of any of the FAA's regulatory authority over air commerce or transportation or over aircraft or airport operations) as EPA determines is necessary to protect the public health and welfare. The FAA shall consider such proposed regulations submitted by EPA under this paragraph and shall, within thirty days of the date of its submission to the FAA, publish the proposed regulations in a notice of proposed rule-making. Within sixty days after such publication, the FAA shall commence a hearing at which interested persons shall be afforded an opportunity for oral (as well as written) presentations of data, views, and arguments. Within a reasonable time after the conclusion of such hearing and after consultation with EPA, the FAA shall —

“(A) in accordance with subsection (b), prescribe regulations (i) substantially as they were submitted by EPA, or (ii) which are a modification of the proposed regulations submitted by EPA, or

“(B) publish in the Federal Register a notice that it is not prescribing any regulation in response to EPA's submission of proposed regulations, together with a detailed explanation providing reasons for the decision not to prescribe such regulations.

“(2) If EPA has reason to believe that the FAA's action with respect to a regulation proposed by EPA under paragraph (1)(A)(ii) or (1)(B) of this subsection does not protect the public health and welfare from aircraft noise or sonic boom, consistent with the considerations listed in subsection (d) of this section, EPA shall consult with the FAA and may request the FAA to review, and report to EPA on, the advisability of pre-

scribing the regulation originally proposed by EPA. Any such request shall be published in the Federal Register and shall include a detailed statement of the information on which it is based. The FAA shall complete the review requested and shall report to EPA within such time as EPA specifies in the request, but such time specified may not be less than ninety days from the date the request was made. The FAA's report shall be accompanied by a detailed statement of the FAA's findings and the reasons for the FAA's conclusions; shall identify any statement filed pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 with respect to such action of the FAA under paragraph (1) of this subsection; and shall specify whether (and where) such statements are available for public inspection. The FAA's report shall be published in the Federal Register, except in a case in which EPA's request proposed specific action to be taken by the FAA, and the FAA's report indicates such action will be taken.

"(3) If, in the case of a matter described in paragraph (2) of this subsection with respect to which no statement is required to be filed under such section 102(2)(C), the report of the FAA indicates that the proposed regulation originally submitted by EPA should not be made, then EPA may request the FAA to file a supplemental report, which shall be published in the Federal Register within such a period as EPA may specify (but such time specified shall not be less than ninety days from the date the request was made), and which shall contain a comparison of (A) the environmental effects (including those which cannot be avoided) of the action actually taken by the FAA in response to EPA's proposed regulations, and (B) EPA's proposed regulations.

(5)

"(d) In prescribing and amending standards and regulations under this section, the FAA shall —

"(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this Act and the Department of Transportation Act;

"(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

"(3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

"(4) consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

"(5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section.

"(e) In any action to amend, modify, suspend, or revoke a certificate in which violation of aircraft noise or sonic boom standards or regulations is at issue, the certificate holder shall have the same notice and appeal rights as are contained in section 609, and in any appeal to the National Transportation Safety Board, the Board may amend, modify, or reverse the order of the FAA if it finds that control or abatement of aircraft noise or sonic boom and the public health and welfare do not require the affirmation of such order, or that such order is not consistent with safety in air commerce or air transportation."

(c) All —

(1) standards, rules, and regulations prescribed under section 611 of the Federal Aviation Act of 1958, and

(2) exemptions, granted under any provision of the Federal Aviation Act of 1958, with respect to such standards, rules, and regulations,

which are in effect on the date of the enactment of this Act, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Administrator of the Federal Aviation Administration in the exercise of any authority vested in him, by a court of competent jurisdiction, or by operation of law.

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IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1637

THE CITY OF BURBANK, a municipal corporation; DR. JARVEY GILBERT, Mayor; ROBERT R. MCKENZIE, Vice-Mayor; Councilman GEORGE W. HAVEN; Councilman ROBERT A. SWANSON; Councilman D. VERNER GIBSON; JOSEPH N. BAKER, City Manager; SAMUEL GORLICK, City Attorney for the City of Burbank and REX R. ANDREWS, Chief of Police of the City of Burbank,

Appellants,

—vs.—

LOCKHEED AIR TERMINAL, INC., a corporation, PACIFIC SOUTHWEST AIR LINES, a corporation, and AIR TRANSPORT ASSOCIATION OF AMERICA,

Appellees.

**BRIEF OF AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL, AS AMICUS CURIAE**

**Opinions Below, Questions Presented
and Constitutional and Statutory
Provisions Involved**

In the interest of brevity the statements contained in the brief of the Appellees with respect to the Opinions Below, Questions Presented and Constitutional and Statutory Provisions Involved are hereby adopted.

Preliminary Statement

Air Line Pilots Association, International of 1625 Massachusetts Avenue, N. W., Washington, D. C., submits this brief as *amicus curiae* pursuant to the written consent of all parties. A copy of such written consent dated December 6, 1972 is submitted herewith. This brief is submitted in support of the position of the Appellees.

Status and Interest of Air Line Pilots Association, International

Air Line Pilots Association, International, hereinafter ALPA, is an international labor organization affiliated with the American Federation of Labor-CIO.

ALPA is an unincorporated association organized for the purposes and objectives of a labor organization. It is the collective bargaining representative under the Railway Labor Act of approximately 28,000 pilots and 15,000 flight attendants employed by the majority of the scheduled air carriers of the United States.

ALPA has actively represented such employees not only for purposes of collective bargaining but also for the purpose of developing and maintaining standards of safety in matters pertaining to air transportation since 1933.

ALPA through its Safety Organization has maintained a deep involvement in matters of safety. It has participated actively in the development of effective safety programs including the investigation of airline accidents and the creation of a nationwide system. A substantial portion of ALPA's budget has been devoted to such purposes.

The nature of ALPA's standing and interest is shown by the leading cases on the question of federal supremacy and preemption as to air traffic regulation, and particularly as to air traffic regulation involving control of aircraft noise. ALPA was a plaintiff in *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 132 F. Supp. 871 (E.D.N.Y. 1955), 238 F. 2d 812 (2d Cir. 1956); and in *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), aff'd. 398 F. 2d 369 (2d Cir. 1968), cert. den., 393 U.S. 1017 (1969); and in *Air Transport Association of America, et. al. v. The City of Inglewood, etc., et al.*, F. Supp. (Central District of California, 1972).

Summary of Previous Decisions

In *Cedarhurst* a village adjacent to John F. Kennedy Airport (then Idlewild) asserted the power to control the altitude of aircraft flying over its boundaries when landing at or taking off from the airport. The local ordinance, which was aimed at noise control, prohibited flights at an altitude below 1,000 feet.

In *Hempstead* the township adjacent to the same airport attempted to achieve noise control for aircraft crossing its boundaries without specifically mentioning altitudes but by reference to noise levels in terms of decibels.

In *Inglewood*, a village adjacent to Los Angeles International Airport, attempted to regulate air traffic crossing its boundaries by establishing noise standards in terms of decibels but excluding from the scope of such regulation aircraft operated pursuant to federal air regulations or operating under emergency orders.

In each of the above cases the municipality sought to circumvent the Constitutional protection of federal authority by attempting to segregate noise control from traffic control. In each case the court had no difficulty in perceiving the actual interference with the federal authority over air traffic control despite the attempted artificial segregation of noise from traffic.

In *Cedarhurst* it was asserted that federal authority had not been exercised below 1,000 feet. In *Hempstead* it was asserted that noise control was not an area occupied pursuant to federal authority. In *Inglewood* it was asserted that by reason of the exemption of aircraft operating pursuant to federal air regulations or operating under emergency orders there was neither conflict nor invasion of a preempted area.

The Case at Bar

In the case at bar it has been asserted by the City of Burbank that none of the foregoing authorities is controlling because the local ordinance in question merely prohibits pure jet aircraft from taking off from the Hollywood-Burbank Airport between 11:00 P.M. one day and 7:00 A.M. the next day. It is evidently the theory of the Appellants that an absolute prohibition of all flights during stated hours does not constitute regulation of air traffic in the sense in which air traffic control is exercised and preempted by federal authority.

Decisions Below

The District Court herein concluded:

"Our scientific and mechanical expertise has not yet solved the problem of noise resulting from the generation of power by jet engines. However, if the time during which the navigable air space may be used is to be curtailed, the Court concludes that the action must come from Congress, or its authorized agency, if the safe and efficient use of the air space is to be maintained and interstate commerce protected from unreasonable burden and interference." (Appendix, p. 373)

Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the Court of Appeals concluded:

"In this case, we have found the conclusion of federal preemption 'unavoidable.' Furthermore, the Federal Aviation Act also contains language of exclusivity. 49 U.S.C. § 1508 declares that the United States possesses and exercises 'complete and exclusive national sovereignty in the airspace of the United States . . .' That is the same type of expression which the Supreme Court found in the Federal Tobacco Inspection Act to evidence Congressional intent to establish a wholly federal system which States were powerless even to supplement. *Campbell v. Hussey*, 368 U.S. 297 (1961)." (Appendix, p. 424)

Referring to the runway preference order dealing with the problem of noise in the vicinity of the airport, which the FAA Chief of the airport traffic control tower at Hollywood-Burbank Airport had issued, the Court of Appeals declared:

"The order stated that '[p]rocedures established for the Hollywood-Burbank airport are designed to reduce community exposure to noise to the *lowest practicable minimum . . .*' (emphasis added). This assertion represents a considered determination by an authorized representative of the FAA that measures of the magnitude of that taken by the City of Burbank are beneath 'the lowest practicable minimum.' The municipal curfew ordinance, therefore, interferes with the balance set by the FAA among the interests with which it is empowered to deal, and frustrates the full accomplishment of the goals of Congress.' Because of this conflict, as well as the general preemption of the area of aircraft noise regulation from the exercise of a State or local government's police power, the Burbank ordinance is unconstitutional, illegal and void." (Appendix, pp. 426-427)

POINT I

The Burbank Ordinance is invalid upon the grounds of conflict, preemption and burden on commerce.

It is the position of ALPA that each of the cases outlined above, including the case at bar, involves the same essential question, namely, whether the area of air traffic control has, pursuant to the Constitution and Act of Congress, been occupied by the federal government or whether it has been reserved for local regulation. ALPA respectfully submits that the decisions above cited holding that the attempted local regulation in each case presented either a direct conflict with federal regulation of air traffic, or the invasion of a preempted area, or a burden on interstate commerce, were correct, and that there is no sound basis

for the Appellants' attempted distinction herein based upon the superficial difference that the local ordinance seeks to control noise by the absolute elimination of all flights during 8 out of 24 hours.

Impact of Local Regulation Upon the National Scheme

In *Hempstead* the District Court made the following statement which was quoted with approval by the District Court in the case at bar:

"Such an ordinance as Hempstead's cannot be considered in the accident of its particular circumstances. * * * In the perspective of power, the ordinance must be tested as if it were one of a set of ordinances each enacted by a bordering town, and all, taken together, enveloping the airport. Diversion of the airport traffic over another Town would then be impossible and each ordinance would be revealed in its inner nature as a direct regulation of aircraft flight. * * * The question remains, may the municipalities that surround an airport adopt such ordinances as Hempstead's which deny to aircraft those parts of the navigable air space that cannot be used without causing noise on the ground in excess of specified limiting noise spectra.

"* * * legislation, whatever its purpose, that denies access to navigable air space by local rule cannot but be regarded as a plain and forbidden exertion of the power to regulate commerce as such.
* * *

"But even if the commerce clause were not thought without more to preclude local action of the kind here involved, the actual exercise by the Congress of the power to regulate in this field is so pervasive as to preclude valid enactment of the Hempstead Ordinance. It would be difficult to visualize a more com-

prehensive scheme of combined regulation, subsidization and operational participation than that which the Congress has provided in the field of aviation."

* * * * *

"Local initiative in noise control of aviation is inherently an effort to regulate a consequence while disclaiming regulation of the cause. It cannot co-exist with a comprehensive system of federal regulation of aircraft manufacture (through certificates of airworthiness) and federal regulation of air navigation and air traffic." (272 F. Supp. 226, at pp. 231-232, 235; Appendix, pp. 364-365) *

The District Court's analysis goes to the heart of the matter. Interstate air traffic control is an indivisible structure. It cannot realistically be broken into separate segments measured by the geographical boundaries of villages, townships, cities and the like. Air traffic has added new dimensions to transportation. It is not contained within bounds marked on the surface of the earth as are railways, waterways and highways; it operates at a speed approaching that of sound. Air traffic must be described as a form of interstate commerce essentially different from pre-existing forms of transportation. Its path through space is based upon the necessities of aerodynamics rather than the conventions of municipal jurisdiction.

A local ordinance affecting air traffic cannot be considered in isolation. The national system of air traffic is a sensitive organism, all parts of which are closely inter-related. What may appear to be a trivial matter at a small airport may interrupt the safe flow of interstate air traffic

* Doubts as to the proliferation of local restrictions may be answered by reference to *Cedarhurst*, *Hempstead*, *Inglewood* and similar cases demonstrating the ingenuity and persistence of local authorities in their attempts to regulate.

over thousands of miles. Exhibit 33 (Appendix, pp. 115, *et seq.*) is an order of the FAA entitled "Central Flow Control Order" which provides for centralized flow control from Washington, D. C. in order to coordinate flow control throughout the national air traffic system. Other federal air traffic control centers, regional and local, also established by FAA order, must report their intentions to the Washington, D. C. center in advance, and await approval, in order to achieve system-wide coordination. (Appendix, pp. 115, 390-391).

The admitted facts in this case show the all pervasive federal control of air transportation, including the licensing of pilots, construction and maintenance of airport facilities, airworthiness certification of aircraft, and nationwide control of air traffic (Appendix, p. 384). The District Court correctly found:

"Aircraft have such a range and such speed and they involve such technical complexity that they have to be managed on a centralized basis. The transport aviation industry is unique and must be regulated on a national basis, both technically and economically, by the Federal Government. The approach to the solution of air transportation problems at the local level does not work. Regulation on a national basis is required because air transportation is a national operation." (Finding No. 59, Appendix, p. 394.)

In the light of these facts it is somewhat ludicrous to contemplate the operation of the local ordinance here in question which would relegate to the "City's Police Department" and to the "Watch Commander" of the local police the question whether there is a flight "of an emergency nature".

The locking up of the Hollywood-Burbank Airport between the hours of 11:00 P.M. and 7:00 A.M. cannot be disregarded as a harmless local measure. It has significant reverberations throughout the national system of air traffic control. The measurement of time for national air traffic control regulation is not limited to the clock located at the Burbank City Hall. When the clock is 11:00 P.M. at Burbank it is 8:00 P.M. at Hawaii. When the clock is 5:00 A.M. at Burbank it is 8:00 A.M. at New York.

The District Court made the following findings of fact bearing upon the effects of the Burbank curfew:

"... if a curfew ordinance such as that before this Court were held valid, similar ordinances would be adopted by virtually all cities surrounding airports." (Finding No. 69, Appendix, p. 396.)

"The imposition of curfew ordinances on a national basis would have a near catastrophic effect on the national air transportation system ...". (Finding No. 70, Appendix, p. 396.)

"The imposition of curfew ordinances on a nationwide basis would result in a bunching of flights in those hours immediately preceding the curfew. This bunching of flights during these hours would have the twofold effect of increasing an already serious congestion problem and actually increasing, rather than relieving, the noise problem by increasing flights in the period of greatest annoyance to surrounding communities." (Finding No. 78, Appendix, p. 399.)

The necessity for an exclusively federal system of air traffic control is apparent in more than an academic sense. There could hardly be a more effective demonstration of the merger of constitutionality and practicality which was the design of the writers of our Constitution.

POINT II

Huron is not applicable

The case of *Huron Portland Cement Company v. Detroit*, 362 U.S. 440, 80 Sup. Ct. 813 (1960) is not applicable. It was properly distinguished from the case at bar by the Court of Appeals on the ground that in *Huron* the purpose of the federal inspection laws was limited to protection against the perils of marine navigation, a purpose which was unaffected by local control of air pollution. In the case at bar the crucial fact is that Congress has granted the FAA responsibility for balancing "considerations of safety, efficiency, technological progress, common defense and environmental protection" in terms allowing of no doubt as to the exclusivity of federal jurisdiction. (Circuit Court opinion (Appendix p. 419); 49 U.S.C. § 1431 (1968)).

Even if the above distinction were not made it would still have to be concluded that *Huron* is not applicable. That case was decided by this Court a scant two years after enactment of the Federal Aviation Act of 1958. In the decade since *Huron* air transportation has vastly increased in scope and complexity. This Court had no occasion then for concern regarding any claims of applicability of its ruling to the area of national air transportation. *Huron* involved marine transportation on a narrow inland waterway. No menace to a sensitive nationwide system of air transportation could then be perceived in a local smoke-control ordinance. Since *Huron*, passage by Congress of the 1968 Noise Abatement Amendment (Federal Aviation Act § 611; 49 U.S.C. § 1431) and of the Noise Control Act of 1972 (Public Law No. 92-574) made clear the Congressional intention to preempt to federal authority the regulation of aircraft noise. The application of *Huron* to the complexities of jet aircraft traveling at near

sonic speeds, under a comprehensive system of federal control, would be less than realistic. *Huron* is obviously distinguishable from the case at bar, not only on the ground stated by the Court of Appeals but also on the ground of historical development.

POINT III

Questions as to the adequacy of noise regulation are not appropriate for the Court's consideration.

Much has been said about the impact of aircraft noise upon the comfort and health of those who live near airports. It is a subject which generates emotion. Now that ecology has become a by-word, sentiment is stronger than ever in favor of a peaceful and secure environment. ALPA is no less sensitive to these community concerns than other groups. Our sympathy for such aims must not, however, distract us from the pivotal question, which is whether the attainment of such aims must be entrusted to the federal government or to the numerous municipalities lying adjacent to the interstate airports. It is argued that the FAA has not adequately protected local communities from aircraft noise.* That argument is not properly addressed to the courts. It is a contention which should be addressed to the FAA and to Congress. The question here is not how well has the FAA regulated but who is authorized to regulate under the Constitution and the controlling Acts of Congress. As to that essential question it is respectfully submitted that the answer is clear.

* The fact is, however, that the FAA has been active in this area. Findings 54, 55, 56 and 57 show various procedures established by the FAA to alleviate noise. See also Noise Control Act of 1972 (Public Law No. 92-574).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1637

THE CITY OF BURBANK, *et al.*,

Appellants,

v.

LOCKHEED AIR TERMINAL, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF AMICUS CURIAE ON
BEHALF OF THE NATIONAL
BUSINESS AIRCRAFT ASSOCIATION,
INC., URGING AFFIRMANCE

PRELIMINARY STATEMENT

Once we recognize that the future is created in large measure by our present decisions, we become aware of our need to recognize that there are alternative futures that we are either helping to achieve or forestalling by our present decisions. For

this reason our decision-making must be based on visions of the world that may be realized and these alternative futures must be developed by a labor of imagination and thought. For this reason, the phrase 'inventing the future' has become current. If we are to have a future of promise rather than threat, we must conceive that future and then develop ways that our institutions can work collectively to bring it out.¹

Mr. Williams, a futurist of some repute, has set by this quotation the tone and the basis for this presentation by the National Business Aircraft Association, Inc. (NBAA), appearing before this honorable Court as *amicus curiae* pursuant to Rule 42 of the Court's rules.²

Issues involving the quality of our environment are hotly debated, and rightly so, for these are life and death issues for judges, pilots, businessmen, airline executives and city officials. Like most environmental issues, the subject of aircraft noise has been the focus of a great deal of concern for all citizens, and especially those who live in and around airports. NBAA and its member companies are no less concerned about aircraft noise.

The predicate for NBAA's participation in this manner will be fully revealed in subsequent presentation and argument. Mr. Williams' cited statement, calling for the exercise of reasoned and cautious judgment does not militate against this concern, but rather, enhances NBAA's plea that this environmental issue of aircraft

¹Charles W. Williams, Jr., "Inventing a Future Civilization", *The Futurist*, Vol. VI, No. 4, p. 137, at p. 140.

²Consent for this participation was obtained by the National Business Aircraft Association from the primary parties herein. Said consents are submitted with this brief.

noise be handled in accordance with the legislative scheme established by Congress, by those federal agencies empowered to act and develop thoughtful solutions.

The natural reaction of those exposed to the debilitating effects of excessive aircraft noise in the vicinity of airports is to demand curtailment of that noise in any way that brings immediate relief. Such has been the action of the City of Burbank with the passage of Ordinance No. 2216. Rather than allow a leap into a short-term solution in the form of a limitation of hours of operation at airports,³ it is respectfully urged that the Court permit the public's interest in both noise controls and safety in air commerce be served by the agencies exclusively empowered by Congress to handle these matters: the Federal Aviation Administration and the Environmental Protection Agency.

It is the position of NBAA that a national policy of curtailment of aircraft noise necessitates a uniform and coordinated program. It is further postulated that the program has been proposed and enacted by Congress, and that this legislative scheme and activity thereunder have preempted the field of aircraft noise control. NBAA believes, and would convince the Court, that a hodge-podge of State or local regulation in the form of airport curfews would be destructive of that uniformity required for our safety, and "stand as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 61 S. Ct. 399 (1941).

³Statement of the Hon. Rep. Mikva, Cong. Rec. H. 1534, 92nd Cong 2nd Sess., February 19, 1972.

INTEREST OF THE AMICUS

The National Business Aircraft Association, Inc., is a non-profit corporation, incorporated under the Not-For-Profit Corporation Law of the State of New York. It had its original incorporation in that State in 1947. The Association has its primary offices in Washington, D. C.

As suggested by its title, NBAA is the representative of more than 890 member companies located throughout the United States. In fact, it has membership in 46 States of the continental United States, and the District of Columbia. A reading of the membership of NBAA could be likened to reading Fortune Magazine's list of the nation's 500 largest companies.

The avowed purpose of the Association is to protect and promote the aviation interests of corporations operating aircraft both nationally and internationally as an aid to business, and to foster among them the highest degree of operational efficiency and safety.

The role of business aviation is not widely understood by those outside the business and corporations actually engaged in it. The corporate aircraft is often construed as the private toy for the exclusive pleasure of the chief executives of a large company. Appellants in the instant case demonstrate this view by passing off the statement that—

The only other flights affected by the ordinance were principally departures (at least three per week) of corporate jet aircraft [R. 389].¹

The "corporate jet aircraft", or business aircraft as we prefer to call them, based at the Hollywood-Burbank

¹ Jurisdictional Statement, at p. 9, Appellees, Vol. 1, p. 52.

Airport, are the property of Union Oil Company, Sears & Roebuck, Fluor Corporation, Ambassador College, Cal State Jet Ways, and the Belridge Oil Company.² These companies operate equipment such as the Lockheed Jet Star, an aircraft with a cruising speed of 570 mph and a range of 2,450 miles, costing as much as \$2,150,000; the Gulfstream II, a jet aircraft manufactured by Grumman Aircraft Corporation, an NBAA member, with a cruising speed of 590 mph, at a cost of \$3,400,000; the De Havilland 125, a Hawker-Siddely International, Inc., product, with a cruising speed of 510 mph and a range of 2,060 miles, at a cost of \$1,000,000; Lear jets, with cruising speeds up to 508 mph and ranges of about 1,800 miles, costing between \$805,000 to \$950,000; and Falcons, manufactured in France, sold through Pan American World Airways, Inc., for about \$1,600,000, with cruising speeds of 540 mph and a range of about 1,900 miles.³

From the foregoing, it is clear to see that the business aircraft based at the Hollywood-Burbank airport have the capability of moving rapidly in interstate commerce, and in international air commerce, for long and uninterrupted flights. Moreover, Union Oil Company has additional fleet aircraft and additional bases at Midland and Houston, Texas, Des Plaines, Illinois, and Lafayette, Louisiana. Sears, a huge and well known corporation, has an aircraft based in Chicago as well.

² Sears, Fluor, and Union Oil are all NBAA members.

³ Figures developed Table 1, Business Aircraft Specifications, Supplement to Business Aviation Practices, Studies in Business Policy, No. 132, (e) 1970 National Industrial Conference Board, Inc., 845 Third Avenue, New York, New York 10022.

The Hollywood-Burbank airport is only a small example of the extent of business aviation's involvement in interstate commerce. While the scheduled carriers serve about 970 airports across the United States business aircraft can and do serve thousands of the nation's more than 11,000 airports.⁴ According to the Department of Transportation, there were 1060 turbojet general aviation⁵ aircraft operating in 1972, with an expected increase to 1,145 in 1973 and to 1,227 in 1974.⁶ In 1972 there were 790,000 operations by general aviation turbojet aircraft in the United States, with an expected increase to 960,000 operations in 1974.⁷ Business aviation constitutes the majority of these aircraft and operations.⁸ The total hours flown for business aviation in 1971 totalled 7,119,000 hours, with an average flying time of 1.2 hours⁹ per flight. The FAA has forecasted that by 1980, 12.8 million hours will be flown by business aviation operators.

These factors are presented in order to demonstrate the extent of business aviation's involvement in interstate

⁴ Affidavit of Lawrence Bedore, Manager, Airport Services, National Business Aircraft Association, Inc., submitted in *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 A.2d 692 (1969), attached here as Exhibit I.

⁵ The term general aviation is utilized to describe non-commercial aviation and includes business jets.

⁶ Aviation Cost Allocation Study, Working Paper No. 7, Office of Policy Review, Dept. of Transportation, July, 1972, Table B-2, Appendix B.

⁷ *Ibid.*, App. C, Table C-1.

⁸ Aviation Cost Allocation Study, Working Paper No. 5, Office of Policy Review, Dept. of Transportation, July, 1972, at p. 92.

⁹ *Ibid.*, Table 36.

commerce, and the obvious interest of NBAA, on behalf of its membership, in a matter as significant as a locally enacted curfew, that has the implication for broader application as well.

The sophistication and pace of many business activities today require the use of air transportation for those businesses to remain competitive. Production processes and inventory distribution concepts have changed as a direct result of civil aviation. Today, production stages may be widely separated to optimize skills and minimize costs, while the speed of air transportation helps eliminate large inventories. Speed has also allowed businessmen to increase the sphere and rate of their activities. As a result, it has become practical to decentralize operations and centralize management. The speed, capacity, and flexibility of civil aviation have allowed business to compete more efficiently in an era of rapidly rising costs. Consequently, consumers today are enjoying more products for less cost than would have been possible if business were forced to use pre-World War II air transportation and other methods for movement of people and goods.¹⁰

Business aviation has come into being as the result of the needs alluded to in the above quotation. The concept of the corporate aircraft as an expensive toy is discounted in today's age of moving executives and corporate employees to and from places that airlines do not reach directly at any time of the day or night.¹¹ The use of business jet aircraft translates time savings into company profits, and it makes dollars and sense for large,

¹⁰ Joint NASA-DOT Civil Aviation Research and Development Policy Study, Report, March, 1971, at p. 4-3.

¹¹ *Ibid.*, at p. 4-7.

multi-state organizations such as Sears and Union Oil, to move its people by company aircraft to cities unserved by air carriers or distant from air carrier airports. The business aircraft also adds flexibility inasmuch as a corporate executive often must attend meetings or make appearances at cities served by air carriers at times when their schedules do not match his.

The flights of business aircraft are regulated by the Federal Government, just as all civil aircraft are regulated. Corporate pilots must meet standards prescribed by the FAA. In most cases, these pilots hold Airline Transport Ratings, but they have no less than a Commercial Pilot's Rating to operate a business aircraft as pilot-in-command.¹² The special status of business aviation has been recognized by the Federal Government by the recent passage of a new Subpart D to Part 91 of the Federal Aviation Regulations, 14 CFR 91D. Under this new Subpart, business aircraft operators are held to a higher standard of care than that class of aircraft users known as "general aviation". One of the reasons for upgrading the regulations was business aircraft themselves. Business jets are as fast and as complex as the jets flown by air carriers. They have similar capability in range. Although the load factors are widely disparate, business jets use the same facilities and require much the same services as do air carriers.

NBAA's membership operating these jet aircraft, by and large, are companies involved heavily in interstate commerce, utilizing the aircraft in other than local flights, and have a real interest in the non-uniform and unregulated employment of curfew from State to State, and locality to locality. The concern hinges primarily on safety factors, but it would be less than candid for NBAA not to admit that there is a real economic interest.

¹² Bedore Affidavit, *supra*.

Excessive congestion at airports is a safety problem. There has been testimony in the Court below that the imposition of local curfew on a less-than-uniform basis would result in additional congestion at times just before curfew, or at airports that did not have curfew.¹³ Congestion, of course, easily translates into safety problems.¹⁴ Congestion automatically calls for restricted operations.¹⁵

As severe congestions builds around busy terminal areas, the traditional 'first come, first served' of the present air traffic system will have to be abandoned.

The present approach for allotting time and space is workable only if there is excess capacity in the system or if users are willing to accept substantial delays. The problem is compounded because the number of alternate routes is limited and airborne delays cannot be too long. . . .¹⁶

With curfew-caused congestion, and an alteration of the "first come, first served" method of handling air traffic, business aircraft operators are sure to fall behind the air carriers in the priority established to handle traffic. As such, NBAA's membership have an abiding interest.

Furthermore, the concept of congestion creating safety problems is a matter of concern for pilots of all aircraft, and especially those of jet aircraft. In high speed and high performance jets, things can go wrong suddenly, and

¹³ Appellees App., pp. 213-217, 257-265, 294-295.

¹⁴ *Ibid.*, pp. 264-265.

¹⁵ Joint DOT-NASA Report, Civil Aviation Research and Development Policy Study, March 1971, p. 5-9.

¹⁶ *Ibid.*, Support Papers, p. 3-37.

without warning. This danger is compounded in a crowded sky. Ordinarily highly skilled and competent air traffic controllers may become overburdened due to curfew-caused congestion.

The point to be made is that NBAA is legitimately concerned for the lives on board their members' aircraft, as well as for the lives of those on other aircraft. The basis for the concern is not that there is a curfew, but a curfew that is locally imposed by an organization not equipped or empowered to take into consideration all of the aspects of traffic flow and aviation safety. No party to this matter has contested the fact that the Federal Government has exclusive jurisdiction over the movement and coordination of aircraft from an air safety point of view. Noise curfew has a direct impact on safety, and all aspects of safety - and those things impacting upon it require uniformity and coordination.

Economically, NBAA has a real interest insofar as anticipated congestion, airborne delays, diversion and forced layovers due to curfew will be expensive. There is testimony on the record of the testimony of Mr. Von Kann of the Air Transport Association, Mr. Pyle of the Aviation Development Council of LaGuardia Airport, New York, and Mr. Mitchell of Continental Airlines, with respect to the expense of delays, layover and diversions. They have also testified as to flight cancellations due to time zone changes. Much the same is true with respect to corporation aircraft operations. The benefit of an expensive business tool, at an average operating cost of at least \$420.00 an hour¹⁷ whether or not it is in the air, rapidly decreases for each hour it is delayed, diverted or grounded. This translates into economic injury for the operator, and no doubt impacts on profits.

¹⁷ General Aviation Operating Costs, Office of Policy Development, Dept. of Transportation, Feb. 1969.

Uniformity of regulation of our nation's airspace originally gave rise to the need for a single, paramount authority regulating users of the diminishing commodity known as air space, and coordinating usage in the interest of safety.¹⁸ Noise control in the form of curfew not instituted by those charged with considerations of safety as well as environment will create a hazardous circumstance. If locally imposed curfews such as the one before the Court are permitted, a rash of curfews can be expected, and all aviation users will be materially affected with regard to the safety of their operations, as well as the economics involved. NBAA has cooperated with the Federal Government with respect to safety and noise control in the past,¹⁹ and strongly urges that the Court permit EPA and FAA to get on with their Congressionally assigned duties without the well-meaning, though hazardous, interference of State and local authorities.

SUMMARY OF ARGUMENT

I. Preemption Argument

1. The imposition of noise regulations with respect to aircraft noise must be carefully imposed by a centralized agency because of the complicated and fragile system of air traffic control in the United States. Coordination and

¹⁸ S. Rep. No. 1811, Sen. Bill 3880, Federal Aviation Act, of 1958, 85th Cong. 2nd Sess., July 9, 1958, at p. 5.

¹⁹ NBAA has been active in upgrading the safety standards of its membership and took an active role in securing the upgrading of Part D to Part 91 of the FARs. NBAA membership recently participated in noise studies at FAA's NAFEC, in New Jersey (data to be released) and were part of DOT's Report of November, 1971, *Measurement and Analyses of Noise From Seventeen Aircraft In Low Flight*, by Carole S. Tanner.

timing between the various elements of the National Air Transport System bespeaks of the necessity for uniformity, in order to ensure that while noise is adequately controlled, safety is not compromised. A noise curfew at a given airport has an immediate impact on air traffic flow at that airport, and has a domino effect on other airports. The result is a change in air traffic flow that places strains upon the regional air traffic system. Noise curfew implemented at more than one airport in a region will impact upon air flow beyond the region. Curfew instituted on an *ad hoc* basis will affect the system nationally. The effect regionally or nationally will be disruptive of requisite uniformity and coordination through delays, diversions and cancellations. As such, curfew is an invasion into a field cloaked with a public interest. It is submitted that this interest is so dominant that the Federal system will be assumed to preclude enforcement of locally originated curfew.

b. In order to demonstrate the extent of the Federal interest in aircraft noise as it relates to safety, one need only turn to the Federal Aviation Act of 1958. The Act and its legislative history are replete with statements demonstrating that Congress intended to fully preempt regulation of navigable airspace with respect to safety. Anything else that affects safety is regulated as well.

Furthermore, from a review of §611 of the Federal Aviation Act, added in 1968 and amended in 1972, as well as its complete legislative history, it emerges as clear that Congress intended to preempt the field of regulation of aircraft noise *per se*, because of the need for centralization. FAA, with responsibility for an overview of the National Air transportation System has been teamed with another Federal agency, the Environmental Protection Agency, to achieve a working compromise

between curtailing aircraft noise and maintaining safety in air commerce.

c. The Congressional scheme of legislation, coupled with the pervasive and thorough regulatory enactments implemented by FAA and the Civil Aeronautics Board, further demonstrates an intention to preempt. In addition, the airport curfew at Burbank, and the airport curfew generally, conflict directly with the regulations of FAA in the noise and safety area, as well as those of CAB in the economic area. The fact that curfew goes beyond the FAA regulations in noise control does not establish its validity. Indeed, where the Federal government preempts a field, supplementary regulations instituted by State or local governments that surpass the Federal enactments are unenforceable.

II. Burden on Interstate Commerce Argument

States may, in the exercise of their recognized and legitimate police powers, burden interstate commerce within a framework developed by the Court over the years. The exercise of the State's power must be reasonable and non-discriminatory, and must be directed toward the end sought accomplished. It must operate in an area that has not been specifically or impliedly preempted by Congress, and it may not be in conflict with any Congressional legislation. The action must not disturb required national uniformity, disrupt free passage in navigable waterways, exclude Federally licensed activity, or substantially impede or directly burden the free flow of interstate commerce.

The Burbank Ordinance is directed toward the end sought, noise control, but in a manner that is in substantial conflict with a need for national uniformity.

It is operating within a preempted area, and is on a collision course with several acts of Congress and regulations drawn thereunder. Curfew closes airports to aircraft which are in interstate commerce by virtue of the fact that airports, the airways, and navigable airspace are an aspect of interstate commerce, whether or not used by equipment flown intrastate. With respect to the Burbank situation, there are several interstate air carrier operations, as well as the interstate nature of business aircraft, that are directly affected. The Burbank curfew, or curfew generally closing airports, will exclude a Federally licensed activity.

From the record developed at trial, it is submitted that neither a consideration of the Burbank situation alone, nor a consideration of imposition of regional or national curfew, permits the conclusion that such curfews only incidentally or insubstantially burden interstate commerce. The facts developed at trial demonstrate a substantial economic impact upon the free flow of interstate commerce through the imposition of curfew, whether applied to the instant situation, or generally.

ARGUMENT

POINT I

CONGRESS HAS PREEMPTED THE FIELD OF REGULATION OF ALL NAVIGABLE AIRSPACE, INCLUDING REGULATION OF NOISE IN AND AROUND AIRPORTS.

"It is often a perplexing question", wrote Justice Douglas in 1947,¹ "whether Congress has precluded state action or by the choice of selective regulatory measure has left the police power of the states undisturbed except as the state and federal regulations collide."

Such is the question before the Court in this matter. But the difficulty here extends beyond the interpretation of one Act of Congress and a single scheme of regulations, as in the warehouseman cases.² When considering legislation, Federal, State, or local, impacting upon aviation, there must be a consideration of the safety aspects of the legislation, as well as its stated subject matter. In treatment of this matter, therefore, NBAA will attempt to analyze the situation from both the safety and noise aspects, and demonstrate that from both points of view that we are dealing with a "field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of State laws on the same subject."³

¹*Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 67 S. Ct. 1146 (1947), at p. 230, 1152.

²See also, *Rice v. Board of Trade of the City of Chicago*, 331 U.S. 247, 67 S. Ct. 1160 (1947).

³*Rice v. Santa Fe Elevator Corp.*, *supra*, at p. 230, 1152.

A. Tests For Preemption Drawn from the Case Law

We are indebted to his Honor, Judge Matthas, Chief Judge of the Eighth Circuit Court of Appeals, for his highly persuasive decision in *Northern States Power Company v. State of Minnesota*,⁴ which will be discussed *infra*, but most of all for his analytical approach in inquiring into a question involving Federal preemption.⁵

In setting forth the tests announced by Chief Judge Matthas, we have changed the order slightly and expanded somewhat in the citation of the case law to provide this Honorable Court with as much of the case law as possible.

The tests NBAA believes applicable to this case are as follows:

1. Considering the aircraft noise aspects of this case and the impact of curfew on aviation safety, has Congress expressly announced in the Statutes involved⁶ its supremacy in regulating the area of aircraft noise? If it is found that an expressed intention to preempt this sphere of regulation exists, the Ordinance known as Number 2216, section 20-32.1 of the Burbank Municipal Code, must be found to be an unconstitutional excursion into a field fully occupied by Congress. *Campbell v. Hussey*, 368 U.S. 297, 82 S.Ct. 327 (1961); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146 (1947); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373

⁴447 F.2d 1143 (8 Cir. 1971).

⁵*Northern States, supra*, pp. 1146 and 1147.

⁶Federal Aviation Act of 1958, as amended, 49 USC 101 *et seq.*; Noise Control Act of 1972, 86 Stat. 1234, P. L. 92-574, 92nd Cong., H.R. 11021, Oct. 27, 1972.

U.S. 132, 83 S.Ct. 1210 (1963); *ALPA v. Quesada*, 276 F.2d 892 (2 Cir. 1960); *American Airlines v. City of Audubon Park*, 297 F.Supp. 207 (DC WD Ky 1968) *aff'd per curiam* 407 F.2d 1306; *cert. denied* 396 U.S. 845 (1969); *American Airlines v. Town of Hempstead*, 398 F.2d 369 (2 Cir. 1968), *cert. denied* 393 U.S. 1017 (1969); *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424; 83 S.Ct. 1759 (1963); *U.S. v. City of New Haven*, 447 F.2d 972 (2 Cir. 1971); *In re Veterans Air Express Co.*, 76 F.Supp. 684 (DC NJ 1948); *Pennsylvania v. Nelson*, 350 U.S. 505, 76 S.Ct. 477 (1955); *IUAW v. O'Brien*, 339 U.S. 454, 70 S.Ct. 781 (1950); *Rosenhan v. U.S.*, 131 F.2d 932 (10 Cir. 1942).

2. If there is an announced express intention to preempt the field by Congress, the States cannot exert concomitant or supplementary regulatory authority over the activity that is the subject of the preemption. *Frigg v. Commonwealth of Penna.*, 16 Pet. 539, 10 L.Ed. 1060 (1842); *Charlestown & W.C. R.R. Co. v. Varnille Furniture Co.*, 237 U.S. 597, 35 S.Ct. 715 (1915); *Southern R. Co. v. Railroad Com.*, 236 U.S. 439, 35 S.Ct. 304 (1915); *Pennsylvania v. Nelson*, *supra*; *Rosenhan v. U.S.*, *supra*; *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399 (1941); *Napier v. Atlantic Coast Line*, 272 U.S. 605, 47 S.Ct. 207 (1926); *Penna. R. Co. v. PSC of Penna.*, 250 U.S. 566, 40 S.Ct. 36 (1919); *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704 (1971).

In addition, where the intention of the State legislature in legislation is to exercise its police power, and its legislation is in no way intended to interfere with a Congressional action, if the State legislation is in a preempted area, it must fall. *Perez v. Campbell*, *supra*; *Minnesota v. Barber*, 136 U.S. 313, 10 S.Ct. 862 (1890).

Furthermore, the Supreme Court has held that even if the State's action has preceded the preempting Congressional legislation, the Court can consider the later drawn statute of Congress that fills the field, and strike down as unconstitutional the prior State action. See *Hines v. Davidowitz, supra*, wherein the Supreme Court considered and found void the prior-passed Pennsylvania Alien Registration Act in light of the Alien Registration Act passed by Congress. Also see *Vanderbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 61 S.Ct. 347 (1941); *H.P. Welch Co. v. New Hampshire*, 306 U.S. 79, 59 S.Ct. 438 (1939).

3. Where there is an impossibility of compliance with both Federal and State enactment (so-called conflict), a holding of Federal exclusion is inescapable. *Florida Lime and Avocado Growers, Inc., supra*; *Case v. Bowles*, 327 U.S. 92, 66 S.Ct. 438 (1946); *Cloverleaf Butter Co. v. Patterson*, 314 U.S. 148, 62 S.Ct. 491 (1942); *Perez v. Campbell, supra*; *Rice v. Santa Fe, supra*; *Colorado Anti-Discrimination Co. v. Continental Airlines*, 372 U.S. 714, 83 S.Ct. 1022 (1963); *American Airlines, Inc. v. Town of Hempstead, supra*; *Allegheny Airlines v. Cedarhurst*, 238 F.2d 812 (2 Cir. 1956); *Castle v. Hays Freight Lines*, 348 U.S. 61, 75 S.Ct. 191 (1954); *Huron Portland Cement Co. v. Detroit*,⁷ 362 U.S. 440, 80 S.Ct. 813 (1960); *Kelly v. Washington*, 302 U.S. 1, 58 S.Ct. 87 (1937); *Hill v. Florida*, 325 U.S. 538, 65 S.Ct. 1373 (1945); *Sperry v. Florida*, 373 U.S. 379, 83 S.Ct. 1323 (1963); *U.S. v. New Haven, supra*; *Gibbons v. Ogden*, 22 U.S. 1 (1824).

⁷The *Huron* case is relied upon substantially by Appellants. It will be demonstrated *infra* that it is not controlling of the issue at hand but is in fact supportive of Federal preemption in this situation.

4. Where there is neither announced preemption, nor a direct conflict, the Court has examined the circumstances of the cases and determined whether or not there is an implied Federal preemption. *Bethlehem Steel Co. v. N.Y. State Labor Relations Board*, 330 U.S. 767, 67 S.Ct. 1026 (1947); *Napier v. Atlantic Coast Line*, *supra*; *Castle v. Hays Freight Lines*, *supra*; *Campbell v. Hussey*, *supra*; *Rice v. Santa Fe*, *supra*; *Florida Lime and Avocado Growers v. Paul*, *supra*; *Hines v. Davidowitz*, *supra*.

Judge Matthas tells us that there are four major questions to be asked in implying preemption:

(a) Is an aim and intention on the part of Congress to occupy the field revealed by the legislative history of the Federal enactment? *Florida Lime and Avocado Growers*, *supra*; *Campbell v. Hussey*, *supra*; *Rice v. Santa Fe*, *supra*.

(b) Is the Federal regulatory scheme so persuasive as to represent an intention to preempt the field? *Pennsylvania v. Nelson*, *supra*; *Bethlehem Steel v. N.Y. State Labor Relations Board*, *supra*.

(c) Is the subject matter involved one that demands exclusiveness of Federal regulation in order to achieve uniformity vital to the national interest? *Florida Lime and Avocado Growers*, *supra*; *Campbell v. Hussey*, *supra*; *Huron Portland Cement Co. v. Detroit*, *supra*; *Northern States Power Co. v. Minnesota*, *supra*; *American Airlines v. City of Audubon Park*, *supra*; *Colorado Anti-Discrimination Com. v. Continental Airlines*, *supra*; *American Airlines v. Hempstead*, *supra*; *Head v. N.M. Board of Examiners*, *supra*; *Hines v. Davidowitz*, *supra*; *Udall v. FPC*, 387 U.S. 428, 87 S.Ct. 1712 (1967); *Allen-Bradley Local No. 1111 v. Wisconsin E.R. Board*, 315 U.S. 740, 62 S.Ct. 820 (1942); *Clover v. Butter v. Patterson*, *supra*; *Penna. R. Co. v. PSC of Penna.*, 250

U.S. 566, 40 S.Ct. 36 (1919); *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 58 S.Ct. 510 (1938); *Kelly v. Washington*, *supra*; *N.Y. Central R. Co. v. Winfield*, 244 U.S. 147, 37 S.Ct. 546 (1917); *Townscend v. Yeomans*, 301 U.S. 441, 57 S.Ct. 842 (1937); *Southern Pac. Co. v. State of Arizona*, 325 U.S. 761, 65 S.Ct. 1515 (1945); *California v. Zook*, 336 U.S. 725, 69 S.Ct. 841 (1949); *Local 174 v. Lucas Flour Co.*, 369 U.S. 105, 82 S.Ct. 571 (1962); *Morgan v. Virginia*, 328 U.S. 373, 66 S.Ct. 1050 (1946); *Minnesota Rate Cases*, 230 U.S. 352, 33 S.Ct. 729 (1913); *Cooley v. Board of Wardens*, 53 U.S. 298 (1851).

(d) The last test to be applied under this heading of implied preemption is whether the law enacted by the State stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz*, *supra*; *American Airlines v. Hempstead*, *supra*; *Florida Lime and Avocado Growers, Inc.*, *supra*; *Gibbons v. Ogden*, *supra*.

We will turn now to a consideration of these tests, applying case law, statutory language, legislative history, or Federal regulation as applicable. The methodology of the approach will be to treat each test from the point of the impact of aircraft noise curfew upon the overriding concern for aviation safety, as well as from the aspect of the Noise Act of 1972, *per se*. This approach, by necessity, will involve some duplication in effort that, for the sake of clarity, is unfortunately unavoidable.

B. Discussion of Tests for Preemption as Applied to this Case

(1) Test (1)—Congress has fully expressed its intention to regulate all activity involving navigable airspace, from a safety point of view. Curfew ordinances affect navigable

airspace and impact upon aviation safety and are therefore operating within a preempted area.

We have stated in an earlier part of this brief that there is a positive relationship between safety and the control of aircraft noise in the vicinity of airports through curfew. It is obvious that a curtailment of travel through navigable airspace has an impact upon such travel. From the safety aspect it is less obvious that a single incidence of curfew would have an impact upon safety. It was explained, though, in the Court below and in our preliminary statement, that curfew, if broadly enacted across the continental United States, would cause delays, cancellations and diversions of flights. The cancellation of flights impacts economically. Delays and diversions not only impact economically, but present a safety problem of considerable magnitude.

It has been argued below, and will no doubt be argued at this level, that the institution of a single curfew at a "neighborhood" airport at Burbank is at issue, not a broadly and inharmoniously enacted curfew. That curfew on the local level is waiting in the shadows is evidenced by frustrations that brought about this case, the *Morristown*¹ decision, and the *Williams*² case in Arizona. This Court, as did the District Court below, can and should consider the ramifications of locally imposed curfew, as its decision herein will be utilized in a flood of local curfew cases should the Courts below be reversed.

Taking into consideration matters that naturally flow from circumstances such as those involved here would

¹ *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 A.2d 692 (1969).

² *Williams v. Superior Court of Arizona*, ___ P.2d ___, Ariz. Ct., 1972, vacating 489 P.2d 854 (1971).

not be a proceeding strange to the Court. In *Southern Pacific Co. v. Arizona*,³ a case that dealt with the assertion of the State of Arizona that it was within its police power to regulate the length of freight trains passing through the State as a safety measure,⁴ the Court considered the States surrounding Arizona, and the ramifications of each State instituting a different set of rules regulating the length of trains. The potential for delays, the costs of additional manpower, equipment and possible inconvenience were all taken into account, although the only regulation before the Court was that of the State of Arizona. In *Udall v. FPC*,⁵ the Court undertook to postulate a hypothesis in discussing the ramifications of the case before it, the construction of a dam at High Mountain Sheep. Mr. Justice Douglas, writing for the Court, stated:

Timed releases of stored water at High Mountain Sheep may affect navigability; they may affect hydroelectric production of the downstream dams when the river level is too low for the generators to be operated at maximum capacity; they may affect irrigation; and they may protect salmon runs when the water downstream is too hot or insufficiently oxygenated. At p. 435,1716.

The Court thus reached into the ramifications of Federal versus local control, which the Court found "may conceivably make a vast difference in the functioning of the vast river complex." At p. 435,1716.

³325 U.S. 761, 65 S. Ct. 1515 (1945).

⁴The statute was held to be a substantial burden on interstate commerce and thence unconstitutional.

⁵387 U.S. 428, 87 S. Ct. 1712 (1967).

Similar exercises were involved in *Local 174 v. Lucas Flour*,⁶ where the potential uncertainty of different meanings of labor contract terms under Federal and State laws was a possibility that was considered, and in *Bibb v. Navejo Freight Lines*,⁷ where the difference of standards between the States of Arkansas and Illinois for rear fender mudguards on trucks was cited in a case involving Illinois standards.⁸

That delays in flight or diversions create a safety problem is clear from a reading of the case of *American Airlines v. Town of Hempstead*.⁹ In the *Hempstead* case the Town passed a noise ordinance due to jet noise from JFK International Airport. While the Court found that the noise levels were incompatible with sleep, religious services, entertainment, conversation, classroom activities, and were a source of distraction and discomfort, it was likewise found that the ordinance was operating in a preempted sphere, and would not be allowed to stand. It was further found that the ordinance would be determinative of flight patterns and procedures incompatible with those extant at JFK Airport, and that a redesigning of those procedures would not be compatible with preservation of safety margins without impairing the traffic handling capacity of the airport. The ordinance

⁶369 U.S. 105, 82 S. Ct. 571 (1962).

⁷359 U.S. 521, 79 S. Ct. 962 (1959).

⁸Also see *Crandell v. Nevada*, 6 Wall. 35, 18 L. Ed. 745 (1868), where the Court made the following statement: "But if the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one state can do this so can every other state. And thus, one or more states covering the only practicable routes of travel from east to west, or from north to south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other."

⁹398 F.2d 369 (2 Cir. 1968), *Cert. denied* 393 U.S. 1017 (1969).

fell not because it was incompatible as a noise standard with a Federal enactment, but rather, because the ordinance would necessitate the creation of an unsafe condition at the airport.

Now that the implications for safety due to a locally imposed noise regulation through curfew have been established, a short trip through the Federal Aviation Act of 1958, its legislative history, and some more of the case law will establish the fact that Congress has fully preempted the field of aviation safety and all that touches it.

a. The Face of the Act.

The Federal Aviation Act of 1958 was the product of a need for a unified regulatory body, acting in the interest of aviation safety. The need was brought on by an air traffic control crisis that could be directly traced to a highly decentralized system, which permitted several government agencies and arms of the military to exercise a degree of control over air traffic.¹⁰ This lack of coordination culminated in air disasters, a mid-air collision of two heavily laden airliners in the Grand Canyon area, as well as mid-air accidents between military jets and civilian aircraft over Las Vegas, Nevada, and at Brunswick, Maryland.¹¹

President Eisenhower, writing on June 13, 1958, to the Subcommittee of Aviation, Senate Committee on Interstate and Foreign Commerce, recognized that a lack

¹⁰ S. Rep. No. 1811, Committee on Interstate and Foreign Commerce, accompanying S. 3880, Federal Aviation Act of 1958, 85th Cong. 2nd Sess. July 9, 1958.

¹¹ *Ibid.*, at pp. 7-8.

of coordination between the multiple agencies involved in air transportation regulation was in large measure responsible for a breakdown in safety, and accordingly recommended that S.3880 be promptly reported out of Committee.¹²

With the need established, S.3880 was produced, and hearings upon it were begun and completed in hurried sessions.¹³ The Federal Aviation Act of 1958 was born.

On the face of the Act, without delving into the legislative history, one can clearly see that the Administrator of the FAA was given broad and exclusive powers. Section 103 of the Act, 49 USC 1303, provides that the Administrator shall have the power to regulate air commerce "in such manner as to best promote its development and safety . . ."; to promote and encourage the development of civil aviation; to consider research and development with respect to the operation of air navigation facilities, as well as their installation and operation; to develop a "common system of air traffic control and navigation for both military and civil aircraft; and "to control the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of safety and efficiency of both."

Section 104 of the Act, 47 USC 1304, declares as national policy the public right of freedom of transit through the navigable airspace of the United States.

¹² Hearings, Subcommittee on Aviation, Sen. Committee on Interstate and Foreign Commerce, 85th Cong. 2nd Sess., S. 3880, June 16, 1958, at pp. 145-146. Also see *ALPA v. Quesada*, 276 F.2d 892 (2 Cir. 1960), for an outline of the legislative history on this point.

¹³ *Ibid.*, at pp. 59, 264.

In Sections 307(a) and (c), 47 USC 1348(a) and (c), the Administrator's powers are further spelled out with respect to use of airspace.

Use of Airspace

(a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest. [49 USC 1348(c)]

Air Traffic Rules

(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground and for the efficient utilization of the navigable airspace including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles and between aircraft and airborne objects. [49 USC 1348(c)]

In Section 313(a), 49 USC 1354(a), the Administrator of FAA is given broad powers to carry out his duties. It is herein stated that—

The Administrator is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of

this Act, as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under, this Act.

He is also given power with respect to air navigation facilities. Section 606 of the Act, 49 USC 1426, states:

Air Navigation Facility Rating

The Administrator is empowered to inspect, classify, and rate any air navigation facility available for the use of civil aircraft, as to its suitability for such use. The Administrator is empowered to issue a certificate for any such air navigation facility.

In implementing Sections 307(a) and (c), and Section 313(a), the FAA has defined air traffic and air traffic control in 14 CFR 1.1. "Air traffic", according to the regulations, "means aircraft operating in the air or on an airport surface, exclusive of loading ramps and parking areas." "Air traffic control" has been defined as a "service operated by appropriate authority to promote the safe, orderly and expeditious flow of air traffic."

From the foregoing, NBAA believes it safe to say that there are no words of limitation in any of the empowering sections of the face of the Act that would detract from the concept that Congress has intended to pervade the field of aircraft safety regulation. From FAA's definition of air traffic, it is clear that the Administrator has exclusive control over aircraft on the ground, preparing for take off, and after take-off, as well as in the air. Indeed, this concept is supported by Section 101(32) of the Act, 49 USC 1301(32), wherein it is stated that—

an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.

b. Legislative History of the Act.

NBAA would convince the Court that the search need go no further than the face of the Act, but recognizing that a more thorough analysis is called for by this most important case, we respectfully direct the Court's attention to the legislative history of the Act on the subject of Congress' intention to preempt the area of regulation of navigable airspace.

Senator Monroney, writing for the Aviation Subcommittee, made it clear at the outset that Congress intended to establish a paramount authority in the regulation of navigable airspace. He states that the Administrator of FAA—

Would be charged with the management of the national airspace. . . .¹⁴

Further along Senator Monroney points out that—

Aviation is unique among transportation industries in its relation to the Federal Government—it is the only one whose operations are conducted almost wholly within the Federal jurisdiction, and are subject to little or no regulation by States or local authorities.¹⁵

He goes on to state that—

Thus, the Federal Government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest.¹⁶

Senator Monroney recognized the need for an independent FAA, "with plenary authority over the Nation's airspace. . . ."¹⁷ Assuming that the Senator's

¹⁴ *Op. Cit.*, S. Report No. 1811, at p. 1.

¹⁵ *Ibid.*, at p. 5.

¹⁶ *Ibid.*, at p. 5.

¹⁷ *Ibid.*, at p. 7.

vocabulary is standard, Webster defines "plenary" as: full, entire, complete. It is clear, therefore, that Congress intended itself to have complete and exclusive control over the Nation's airspace.

The Committee Report does not rest there. It goes on to provide that—

The present legislation proposes to clear away this ambiguity once and for all by vesting *unquestionable* authority for *all aspects* of airspace management in the Administrator of the new agency. . . .

The Administrator is given *plenary* authority in the matter of air traffic rules, as well as for the development and operation of air navigation facilities.¹⁸ [Emphasis supplied.]

The Senate and the House held hearings on the Act. In the midst of the Senate Hearings, President Eisenhower, as noted previously, sent a message to the Senate Subcommittee. In his message, the President stated:

I recommend that the Federal Aviation Agency be given full and paramount authority over the use by aircraft of airspace over the United States and its Territories. . . .¹⁹

The Senate and the House Hearings saw the same people making presentations, carrying the same themes. The main theme was the need for a single, unified, omnipotent Federal agency, subject only to the President and the Courts, regulating airspace completely, including that airspace in and around airports from the air traffic point of view.²⁰ Industry was of the same view. Stuart

¹⁸ *Ibid.*, at pp. 14, 15.

¹⁹ *Op. Cit.*, Hearings on S. 3880, at p. 148.

²⁰ Hearings, House Subcommittee on Interstate and Foreign Commerce, on H.R. 12616 (Federal Aviation Act of 1958) 85th Cong. 2nd Sess., June and July 1958, at pp. 193, 253. *Op. Cit.*, Hearings on S. 3380, at pp. 2, 23, 27, 28, and 29.

Tipton, speaking for the airline industry at the Senate Hearings, maintained this view, and asserted that, in the interests of safety, one administrator must have control over all the airspace of the country.²¹

Mr. E. Thomas Burnard, Executive Director of the Airport Operators Council, stated:

The whole system of air traffic control and airway capacity . . . begins and ends at an airport. Without the precise and complete control of both military and civil aircraft on and in the vicinity of our great metropolitan airports, as well as on the airways, tragedy can occur again. And without the integrated planning of airport capacity with airway capacity, the improvement of one without the other will create an unacceptable balance.²²

Senator Monroney, in response to some points raised by Mr. Burnard concerning regulation of airspace with respect to the ground thereunder, stated:

We do not want to overlook anything as important as proper jurisdiction over ground areas, or approaches to ground areas that aircraft must use, as well as the airspace above them.²³

David H. Baker, President of Capitol Airlines, Inc., further emphasized the exclusivity of Congressional action in the regulation of airspace:

²¹ *Op. Cit.*, Hearings on S. 3880, at p. 39.

²² *Ibid.*, at p. 51. It is interesting to note that the present airport operators council international, at Section 730 of its current policy handbook, makes the statement that "disruption of airport operations through a nighttime curfew is strongly opposed."

²³ *Ibid.*, at p. 59.

The need for clear cut and single responsibility in control of airspace requires that the Federal Aviation Act of 1958 be adopted with the utmost speed.²⁴

Clifford P. Burton, speaking for the Nation's air traffic controllers, was of the opinion that in the interest of safety all responsibility for rulemaking pertinent to air traffic should be lodged in a single agency, and that—

The agency should have final authority on the allocation of airspace, location of airports, designation of airways or air routes, control zones, control areas, and the establishment of airspace reservations and restricted area.²⁵

A.B. McMullen, Executive Director of the National Association of State Aviation officials was concerned about the absolute preemption intended by the Act.²⁶ He therefore proposed the following mandatory language:

*That nothing in the act shall be deemed to abrogate the right and responsibility of the several States to protect, under their police power, the welfare and safety of their inhabitants.*²⁷ [Emphasis supplied.]

This language does not appear in the Act as passed by Congress. Senator Monroney avoided commentary upon it, although he did refer to "close cooperation with state agencies on the matter of airplane plans and airport construction."²⁸ It can fairly be implied, that since language proposed by Mr. McMullen did not appear in the

²⁴ *Ibid.*, at p. 81.

²⁵ *Ibid.*, at p. 121.

²⁶ *Ibid.*, at p. 136.

²⁷ *Ibid.*, at p. 137.

²⁸ *Ibid.*, at p. 742.

final draft of the Act, it was rejected. To reserve power in the States, under their police power, was not the intention of Congress.

General E.R. Quesada, Chairman of the Airways Modernization Board (and the first Administrator of FAA), speaking for the Administration stated that—

The new agency must be given *full* and paramount authority over allocation and use of airspace by aircraft both civil and military.²⁹

Mr. James T. Pyle, Administrator of the Civil Aeronautics Authority, soon to become Deputy Administrator of the FAA, stated:

... [A]ir safety rules apply almost across the board. Any regulation that is issued in some way or other affects the safety of the use of airspace.³⁰

During the Senate Hearings, testimony was received from Malcom A. MacIntyre, Under Secretary of the Air Force. On the subject of airport development, Senator Monroney, in response to a statement by Mr. MacIntyre, stated:

Of course the Administrator has an absolute right to withhold Federal funds from the Federal aid to airports. The section you are quoting is where the private person goes out with private funds to build [an airport]. *We can't stop them from building one but we can stop them from using it.* [Emphasis supplied.]

Mr. MacIntyre rejoined:

As a practical matter we can't stop the Port of New York Authority either if it chooses to use its own money and change its airport layout.

²⁹ *Ibid.*, at p. 151.

³⁰ *Ibid.*, at p. 236.

To which Senator Monroney replied:

The Administrator of the Federal Aviation Agency can deny the entrance of flights from that airport into the airways system. He can prohibit air traffic. They might build the field but they sure couldn't use it. . . .

Mr. MacIntyre:

I am not sure that you could deny the airspace to anybody unless you wrote it in the bill.

Senator Monroney's reply is clear on the point of preemption. He said:

This [the Act] gives the Administrator control over the airspace, therefore he has the right to do just that. We don't have control over the ground space. Persons can build anywhere they wish. As I read the Act, I think they could still build ground facilities but they wouldn't necessarily be able to get a plane off into the air.

* * * * *

Certainly that is the intent of the Act, and while we didn't assume control of the ground we would control the airspace.³¹

Stronger language than that cited above is not necessary to further support the concept posited in this heading.³²

³¹ *Ibid.*, at p. 279.

³² *Ibid.*, at pp. 333, 334.

c. Court Action Concerning Federal Preemption of Airspace

The lower Federal Courts have uniformly handled this question of Federal preemption of navigable airspace in a manner analogous to the above discussion. *American Airlines v. City of Audubon Park*, 297 F. Supp. 207 (DC WD Ky. 1968), *aff'd per curiam* 407 F.2d 1306; *ALPA v. Quesada, supra*; *American Airlines v. Hempstead, supra*; *In re Veterans Air Express Co.*, 76 F. Supp. 684 (DC N.J. 1948); *U. S. v. City of New Haven*, 447 F.2d 972 (2 Cir. 1971); *Rosenhan v. U. S.*, 131 F.2d 932 (10 Cir. 1943).

One case has reached this Court in the area of Federal sovereignty over the navigable airspace. The case dealt with the predecessor to the 1958 Act, the Civil Aeronautics Act of 1938. See *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U. S. 590, 74 S. Ct. 757 (1954).

The *Braniff* case probably rightly decided that the State of Nebraska could properly levy an *ad valorem* personal property tax on flight equipment operated by Braniff within the state. The opinion, however, handles the argument made by Braniff in the area of Federal sovereignty over national airspace in a remarkable manner. Braniff argued that, since it was regulated by the Federal Government, it could not be taxed by the State. The Court found that the language of the Civil Aeronautics Act did not establish a preemption of control of navigable airspace, but rather asserted an exclusive national sovereignty over the airspace of the limited States. *Braniff, supra*, at pp. 594-596. This sovereignty was held to be exclusive insofar as it applied to foreign governments, but the Act "did not expressly

exclude the sovereign powers of the states." *Braniff supra*, at p. 595.

The 1938 Act is a far cry from the 1958 Act and its legislative history analyzed, *supra*. It is NBAA's belief that the *Braniff* case is of no precedential value since the passage of the 1958 Act, and must be relegated to its place in history. The 1958 Act does not speak in terms of sovereignty but rather in terms of control, paramount authority, plenary authority, and the like. The language recommended by the States through Mr. McMullen of NASAO, *supra*, designed to insure the States of their "sovereignty," was soundly rejected in the enactment of the 1958 Act. *Braniff* is not cited with favor in any of the more recent lower Court holdings. We urge that it have no positive place in this consideration.

On the issue of preemption, some would point to *AOPA v. Port Authority of N. Y.*, 305 F. Supp. 93 (DC ED N.Y. 1969), and *Port Authority of N. Y. v. Eastern Airlines*, 259 F. Supp. 745 (DC ED 1966), and argue that a weakening in the preemptive scheme of the 1958 Act is demonstrated. The Court found in both cases that the FAA did not oppose the Port Authority in levying its fees, and that no conflict with the Federal scheme existed. Rather than resulting in an interference with the safety function, the imposition of the fee schedule was of enhancing effect. The action of the Port Authority, created by a Pact between the States of New York and New Jersey with Congressional approval, did not stand as an obstacle to the execution of a Federal scheme of activity. *Hines v. Davidowitz, supra*.

These lower Court decisions are of limited value to either side of the issue. On the one hand, they are not representative of even a minor weakening in the

preemptive nature of congressional intention in the area of airspace regulation. On the other, the destiny of the cases had they proceeded further to the Second Circuit Court of Appeals is in question. From the legislative history cited herein, NBAA has more than a little doubt as to the wisdom of the lower Courts' decisions in these two cases.

Appellants will no doubt argue that the Federal Aviation Act itself does not contain strong preemptive language. In fact, they may say that the language contained in the Act is in no way preemptive, and cite Section 1106, 49 USC 1506, which states:

Remedies Not Exclusive

Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of the Act are in addition to such remedies.

It is important to note that this section addresses itself to remedies exclusively. The section has been interpreted as permitting actions in State courts on contracts concerning aircraft, commercial matters, and aircraft torts. A Federal tort action has not been created by way of the enactment of the Act. *Porter v. South Eastern Aviation, Inc.*, 191 F. Supp. 42 (DC MD Tenn. 1961). *Rosdail v. Western Aviation Inc.*, 297 F. Supp. 681 (DC Colo. 1969); *Colonial Airlines, Inc. v. Janas*, 202 F.2d 914 (2 Cir. 1953) (interpreting language in the 1938 Act identical to that employed in the 1958 Act); *Mack v. Eastern Airlines, Inc.*, 87 F. Supp. 113 (DC Mass. 1949) (interpreting the identical language in the 1938 Act).

As a final point under this heading, we direct our attention to Appellants' statement in their Jurisdictional Statement concerning the case of *Griggs v. Allegheny County*, 369 U.S. 84, 82 S.Ct. 531 (1962).³³ Appellants

³³ Pp. 14, 15, 16 of Appellants' Jurisdictional Statement.

claim that if this Court finds an absolute preemption intended by Congress, a review of the *Griggs* case is in order. Appellants hereby attempt to raise the bugaboo of massive governmental pay-offs for noise "taking" in and around the area of airports, should it be found that FAA, acting for Congress, has plenary authority in the regulation of airspace.

It is submitted that Justice Douglas, writing for the Court in *Griggs*, in no way limited the Government's paramount control over *safety* in the decision. It is further submitted that the case dealt with a "taking" problem, and the Administrator of FAA, in prescribing regulations in controlling airspace from a safety point of view at the locality selected by the airport operator, is not involved in any taking. The airport operator, in order to obtain Federal participation, must himself "take" and pay just compensation for all the land necessary to insure safe operations at the airport. A holding in this Court that the Administrator, acting for Congress, is the paramount authority with respect to the safety of all flights in navigable airspace would not disturb the holding in *Griggs, supra*, in any way. Since noise regulations impact upon safety standards, it must also be concluded that the Administrator's implementation of noise standards would likewise be divorced from "taking" considerations. "Taking" and supreme authority in regulating safety in air commerce are by no means identical. If this were not so, every enactment of Federal safety legislation would result in a "taking" of one form or another.

NBAA submits that the Federal Aviation Act of 1958, considered under test one, clearly establishes that safety in flight is the exclusive domain of the Federal Government. Since airport curfew has an impact upon

safety, it is a logical conclusion that locally imposed curfew would operate in a preempted area.

2) Tests (2) and (3)—Compliance with locally imposed airport curfew would collide directly with Federally imposed safety standards, and with the authority of the Civil Aeronautics Board. Supplementary regulation on the part of Burbank may not stand.

We have expended a considerable amount of words at this point in arguing that locally imposed curfew ordinances such as the one in issue would create a havoc with respect to the flow of air commerce. It is plain that we do not have an actual conflict situation here with respect to forthcoming Federal noise regulations, since those have not yet been enacted. What we have, as argued before, is a mandate by a local authority that impinges upon a nationally enacted Federal scheme of air commerce, and herein lies the conflict.¹

That the conflict is not head-on is not of paramount concern. We have stated before that noise ordinances of this sort are direct safety ordinances. *American Airlines v. Town of Hempstead, supra*. Furthermore, a conflict can be once removed from direct confrontation, as in *Perez v. Campbell*, 402 U. S. 637, 91 S. Ct. 1704 (1971).

In *Perez, supra*, an action was brought in a Federal District Court in Arizona for an injunction and a declaratory judgment, declaring a section of the Arizona Motor Vehicle Safety Responsibility Act unconstitutional. After the District Court dismissed, and the Court of Appeals affirmed, 421 F.2d 619, this Court reversed

¹ FAA has some noise regulations in the form of regulation in the form of regulation of noise at the source, 14 CFR Part 36, and in locally oriented preferential runway system. These items will be discussed under test (4).

and remanded. The Court of Appeals rested its opinion upon the cases of *Kessler v. Dept. of Public Safety*, 369 U. S. 153, 82 S. Ct. 807 (1962), and *Reitz v. Mealey*, 314 U.S. 33, 62 S.Ct. 24 (1941). In *Kessler* and *Reitz*, financial responsibility laws were considered to be within the police power of the state, even though they conflicted with the Federal Bankruptcy Act. This Court, in reversing, considered *Kessler* and *Reitz* to be "aberrational doctrine."

The facts which the Court considered in *Perez* were as follows: The Arizona statute required that a driver who suffers a judgment due to an automobile accident will lose his driver's privileges until he demonstrates financial responsibility or satisfies the judgment. While a statute such as this appears to be entirely local in nature, the matter becomes complicated when the driver declares personal bankruptcy and is discharged in bankruptcy with respect to the judgment, for while the obligation to pay the judgment may be gone, the driver's road privileges are still suspended under the Arizona Act. The question before Mr. Justice White and this Court was whether the Arizona statute was in conflict with the Bankruptcy Act of the United States.

Mr. Justice White, writing for the Court, stated that he viewed the Court's obligation in a conflict case to ascertain the construction of the two Acts involved, and to determine whether any conflict exists. He wrote, citing *Hines v. Davidowitz, supra*, that in the final analysis the Court's function is to determine whether a challenged State statute "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress."²

² Also see *Castle v. Hays Freight Lines*, 348 U.S. 61, 75 S. Ct. 191 (1954).

If a conflict exists in any way, the Federal scheme must prevail, even though it may be a more modest, less pervasive plan than that of the State. *Rice v. Santa Fe, supra*; *Napier v. Atlantic Coast Line*, 272 U.S. 605, 47 S.Ct. 207 (1926).

It has been stated, on the subject of conflict, that—

The test of whether both Federal and State regulations may operate, or the state must give way, is whether both regulations can be enforced without impairing the Federal superintendence of the field, not whether they are aimed at similar or different objectives. *Florida Lime and Avocado Growers Association, supra*, at p. 142, 1217.

It would be a vain act for Appellants to argue that the noise ordinance is not a safety ordinance, for it undoubtedly affects safety. Even if it were accepted, *arguendo*, that the noise ordinance was aimed at a different area of regulation, it would be an impotent argument. *Napier v. Atlantic Coast Line, supra*; *Pennsylvania R. Co. v. PSC of Pennsylvania*, 250 U.S. 566, 40 S. Ct. 36 (1919).

Nor would it be worthwhile for Appellant to argue that the Burbank Ordinance is supplementary to the Federal scheme. If there is an intention to preempt the field on the part of Congress, supplementary regulation on the part of State or local governments may not be credited. *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. Ed. 1060 (1842); *Charlestown and W. C. R. R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 35 S. Ct. 715 (1915).

Because of the widespread impact of curfew on aircraft operations, Appellant may not be heard to argue that the ordinance is of a local nature, that the problem is one indigenous to Burbank and that Congress may

reasonably be expected never to deal with it. *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 58 S. Ct. 510 (1938).

Addressing ourselves, therefore, to establishing that this conflict exists, we turn to an examination of the National Air Transportation System first, and secondly to the direct conflict between curfew and the Federal Aviation Act of 1958, as it applies to the Civil Aeronautics Board.

Mr. Clifton F. Von Kann, Vice President of the Airline Transport Association, testified at the trial below with respect to the National Air Transportation System or NAS.³ He testified that the NAS is comprised of the ground system or the airport complex, the airway system, which directly involves the air traffic control system, and the fleet of aircraft operating in airspace. Regulation of this system is split between FAA, in the safety area, and the CAB in the area of routes, schedules and economics.

Mr. Benjamin L. Freiman, Chief of the Los Angeles Air Traffic Control Center, was called at the trial below to discuss the concept of air traffic flow,⁴ an important element of the NAS. His operation at the Center handles about 3,000 aircraft a day, in an area extending toward the South to the U. S.—Mexican border, toward the East to the Colorado River, toward the North to mid-California, and about 150 miles seaward toward the West. The area covers 184,000 square miles.⁵ The objective of the Center is the safe and expeditious utilization of airspace.⁶ He testified with respect to a step-by-step

³ Appellees Appendix, p. 257.

⁴ Appellees App., p. 186 *et seq.*

⁵ *Ibid.*, p. 187.

⁶ *Ibid.*, p. 188.

instrument flight through the area regulated by the Center.⁷ The description includes the necessities for flight separation, both vertically and horizontally, time spacing, routing, and passing the aircraft from tower to control center to tower. The scheme becomes more complex the longer the distance, the greater the duration of the flight, and the more aircraft in the air. All these concepts are involved in flow control.⁸ Flow control is a specialty within a Center,⁹ and special teams are assigned to its various aspects. Flow control has become such an important part of NAS that a centralized scheme or flow control plan has been established by FAA in Washington. The Washington Flow Control Center is charged with the responsibility of alleviating airway saturation at peak periods, and coordinating the air traffic system.¹⁰

From this analysis on the record, it must be readily apparent that a very complex, coordinated and fragile system is at work. A breakdown at any time may well cause a hazardous situation. Congestion no doubt causes delays and diversions. Curfew, unless integrated into this flow control system, and the National Air Transportation System, must undoubtedly be as frustrating to the end of safety as congestion and delay. Locally imposed curfew would be an impairment to a well-structured system of Federal superintendence, and thence represent a real conflict.

Turning next to a consideration of the impact of curfew upon the area of authority exclusively left in the

⁷*Ibid.*, pp. 189-192.

⁸*Ibid.*, p. 193.

⁹*Ibid.*, p. 194.

¹⁰*Ibid.*, p. 195.

capable hands of the Civil Aeronautics Board, we would remind the Court that NBAA's membership is not regulated by the Board, but by FAA. Since the question of conflict has no boundaries, we did not feel compelled to limit arguments solely to NBAA's areas of operations.

There were exhibits and testimony in the Court below concerning the role of the CAB. There is no question that the CAB is paramount with respect to regulation of the economic aspects of interstate air transportation. The CAB was established as plenary authority in this area in 1938, and the 1958 Act did not change its status.¹¹

The CAB certifies all interstate air transportation, 49 USC 1371(a). It regulates all schedules, routes, equipment utilized, and airports utilized, 49 USC 1371(e). No part of the certificate of an air carrier may be modified in any of these respects without Board approval, 49 USC 1371(g). These powers apply to regularly scheduled carriers, as well as supplemental carriers, 49 USC 1371(n). Foreign air carriers are regulated by the Board as well, with respect to their operations on U. S. soil or in U.S. airspace, 49 USC 1372. The rates charged by air carriers are regulated, 49 USC 1373. The Board is empowered to inquire into air carrier management, 49 USC 1385, and issue exemptions from its regulations, 49 USC 1386. In carrying out its assigned duties, the CAB has enacted a comprehensive scheme of regulations, 14 CFR 200-399.110.

Curfew at Burbank would be in direct conflict with the Board's authority. United Air Lines, Western Airlines, Air West, and Continental Airlines all use the

¹¹S. Rep. No. 1811, Senate Committee on Interstate and Foreign Commerce, accompanying S. 3880, 85th Cong. 2nd Sess., July 9, 1958.

Hollywood-Burbank Airport for regularly scheduled flights, and as an alternate airport to Los Angeles airport when weather conditions there require it. These airlines are regulated by the Civil Aeronautics Board as described, *supra*. It is patently absurd to assume that, should any or all of these airlines approach the CAB with a request to institute a flight after 1:00 P.M. or before 7:00 A.M., the curfew hours, the Board would consider itself bound by the Burbank Ordinance. Burbank may no more regulate this aspect of airline economics than it may approve a tariff schedule for United, or sanction the merger of Continental with Western.

Appellant would point to the case of *Huron Portland Cement Co. v. Detroit*, 362 U. S. 440, 80 S. Ct. 813 (1960), claiming that no conflict exists in the instant case, and base this claim on circumstances in *Huron* considered to be factually similar to this case. The Courts below have distinguished *Huron*.

In *Huron* the constitutional validity of certain of Detroit's Smoke Abatement Code was drawn into issue. The case therefore dealt with an environmental issue, as does this one. Appellants therein were owners of a fleet of transport vessels operating on the Great Lakes. Two of their vessels were equipped with fired Scotch marine boilers, which had to be fired up and cleaned periodically while the vessels were docked so as to keep deck machinery operative. When the fires were cleaned, smoke emissions from the boilers violated the maximum density permitted under the Detroit Code. The parallel between that situation and this is obvious. While taking off and landing, aircraft at Hollywood-Burbank airport may exceed the tolerances of the community, and led to the enactment of a curfew.

There all similarity ends. Instead of a curfew, the owners of the boats were subjected to criminal sanction. The Court found that the Detroit Code was a legitimate exercise of police power. The exercise of this power was not found to be without the limitations imposed thereupon by the Courts.

In discussing these limitations, the Court set forth the applicable tests for preemption, conflict, and substantial burden on interstate commerce. None of these tests were met, and appellants failed in their appeal.

The Court stated that intent to preempt—

is not to be implied unless the act of Congress fairly interpreted, is in actual conflict with the law of the State. *Huron, supra*, at p. 443, 816.

In considering burden on interstate commerce, the Court stated that the Constitution—

never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens; though the legislation might indirectly affect the commerce of the country. *Huron, supra*, at p. 443, 816.

But, the Court added, that—

A state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary. *Huron, supra*, at p. 444, 816.

In discussing the Federal legislation, the Court concluded that it was aimed primarily at and limited to affording protection “from the perils of maritime navigation.” *Huron, supra*, at p. 444, 817.

Comparing the Court’s decision to our situation at this point, NBAA respectfully points out that there is an actual conflict between Federal enactments and the

Burbank Ordinance. Further, there is an expressed intention on the part of Congress to regulate all of navigable airspace insofar as safety is involved, and this obligation extends beyond safety in flight to safety of persons and property on the ground. Furthermore, the Burbank Ordinance invades an area so charged with a need for uniformity of regulation that few who have travelled in an aircraft will argue with the concept.

It was argued that in *Huron* that the mere licensing of the vessels by Federal authority would manifestly constitute a preemption. The Court struck down this argument. The Court went on to add that Detroit, in enforcing the Code involved, did "not exclude any vessel from the Port of Detroit, nor did it destroy the right of free passage." *Huron, supra*, at p. 448, 818.

In the case before this Court, the Federal government does more than license aircraft and crew. It regulates every movement of an aircraft from the time its engines are started for take-off, until it has completed its roll-out and has reached its parking spot. It regulates each aspect of air carrier economics. It plays a role in airport placement and use, and selection and installation of air navigational facilities.¹² There are no parallels between the extent of Federal involvement with aviation and the two boats owned by appellant in *Huron, supra*.

Indeed, the Court in *Huron* gives us some valuable clues in handling the Burbank situation. It tells us that, after all, no vessel was denied entry to Detroit's ports. Yet Burbank would deny those entitled to utilize airspace at the Hollywood-Burbank airport. The Court tells us that Detroit denied no one the right of free passage. Burbank would deny aviation users that right, guaranteed them by the Federal Aviation Act, at the Hollywood-Burbank airport.

¹² 49 USC 1349, 1350, 1348(b), 1353.

3) Test (4)—If it should be found that the announced preemption discussed in Test (1) is not sufficient, or that an actual conflict between the Federal enactments and Burbank Ordinance does not exist, then this Court should affirm the Courts below, for clearly there is an implied Federal preemption of navigable airspace as it is affected by aircraft noise and safety.

This last test suggested by Chief Justice Matthas surely must be found to apply to the case before the Court. In discussing it, we will break it up into its various elements.

a. The Aim and Intention on the Part of Congress With Respect to Aircraft Noise, was to Occupy the Entire Field.

We have already discussed the Federal Aviation Act of 1958 with respect to Congressional intention in the safety areas, and we have indicated a direct relationship between noise and safety resulting in a direct preemption. It is also apparent, in reading the Noise Act of 1968 which added Section 611 to the Federal Aviation Act of 1958 (49 USC 1431), as well as the recently passed Noise Act of 1972¹ amending Section 611, that a cogent argument can be addressed to the intention on the part of Congress to occupy the area of regulation of aircraft noise, not only from a safety point of view, but from a noise point of view as well.²

¹P.L. 92-574, 92nd Cong. 2nd Sess., October 27, 1972 _____ Stat. _____.

²NBAA has elected to treat this matter under this test rather than in Test (1) because of some ambiguity in the language in the preemption sections of the 1968 and 1972 enactments. The intention to preempt, however, is there.

1. Discussion of the 1968 Noise Act.

Turning first to Section 611 of the Federal Aviation Act, as originally enacted by Congress as Public Law 90-411 in 1968 (hereinafter referred to as the 1968 Noise Act), we find that the Administrator of FAA was required by Congress, within the framework of the Federal Aviation Act of 1958, to prescribe and amend—

such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards, rules and regulations in the issuance, amendment, modification, suspension or revocation of any certificate authorized by this title. [§611(a).]

The Administrator is required to consult with such Federal, State and interstate agencies as he deems appropriate. [§611(b)(2).]

In considering this enactment, Hon. Congressman Pickle spoke in support of H. R. 3400. He stated that—

The Committee, in narrowing the governmental responsibility, requested the noise functions in FAA, which is a part of DOT. Perhaps, more importantly, the Committee made the authority mandatory, rather than discretionary, to assure that the job would be carried out quickly.

*We have to relate noise abatement with safety and this must be realized by all citizens. It is not enough to simply obtain noise abatement. We must have abatement but still maintain safety standards.*³ [Emphasis supplied.]

³Remarks of Hon. Cong. Pickle, H.4707, Cong. Record, 90th Cong. 2nd Sess., June 10, 1968.

In requiring the FAA to act, and adding this requirement to the 1958 Act, Congress clearly intended to preempt the noise area. Interestingly enough, Congressman Pickle reaffirms NBAA's contention that aircraft noise control and safety are inextricably entwined.

Senator Monroney, writing for the Senate on the House Bill that was enacted, provided some language in the area of Federal-State relationships. From the face of the 1968 Act, it appears that the only duty of the Administrator is to consult with State governments as he deems necessary.

In the Senate Committee report, however, a slight confusion is created.

Senator Monroney stated:

It is not the intent of this Committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local governments.⁴

It is unfortunate that this language has been seized upon to confuse a clear intent to preempt. Prior to making this statement, the Senator wrote:

The bill is an amendment to a statute describing the powers and duties of the Federal Government with respect to air commerce. *As indicated earlier in this report*, certain actions by State and local public agencies, such as zoning to assure compatible land use, are a necessary part of the total attack on aircraft noise. . . .⁵ [Emphasis supplied.]

⁴S. Rep. No. 1353 on H.R. 3400, 90th Cong. 2nd Sess., July 11, 1968, at p. 6.

⁵*Ibid.*, at p. 6.

The italicized reference is to a statement made by Senator Monroney earlier in the report that planning for land use in areas near airports is a matter largely within the province of State and local governments.⁶

Senator Monroney, after he made the statement we consider confusing of the issue, went on to cite and quote the Secretary of DOT's letter to the Committee of June 22, 1968, and stated that the Committee concurred in the views expressed therein.

The Courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible level of all overflying has recently been struck down because it conflicted with Federal regulation of air traffic.

*H. R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police power to control noise by regulating the flight of aircraft. [Emphasis supplied.]*⁷

Senator Monroney, after adopting this language, added that:

Of course, the authority of units of local government to control the effects of airport noise through the exercise of land use planning and zoning power is not diminished by the bill.⁸

⁶*Ibid.*, at p. 2.

⁷The Secretary is referring to the *Hempstead Case*, *supra*.

⁸*Ibid.*, at p. 7.

From the foregoing, the following analysis is made. The 1968 Act was an amendment to the Federal Aviation Act of 1958. Absent an intention expressed by Congress to treat it differently, the 1968 Act must be considered within the framework of the 1958 Act. It is clear from the cited statement by Congressman Pickle that Congress intended to apply all that went into the 1958 Act to the 1968 statute.

The next point to be made is that, from NBAA's study of the 1958 Act, *supra*; it is clear that all aspects of flight through navigable airspace are preempted by Congress. The graphic exchange between Mr. MacIntyre and Senator Monroney reported *supra* amply demonstrates that all aspects of flight in and around airports are included.

Even without support from the 1958 Act, it is clear from the Report on the 1968 Act that there was no intention to leave authority over aircraft flight in the area of noise regulation to the States or local governmental units. Though it is stated that there is no intention on the part of Congress to change the apportionment of power between the State and Federal Government, in order to understand what this means, we must unravel exactly what that apportionment is.

The report tells us what it is. The State and local governments have authority in the area of land use planning and in zoning, and that is all. The 1958 Act was clear on the subject, and no change was intended by the 1968 Act. What can be clearer than the statement by the Secretary of Transportation, adopted in full by the reporting committee, to the effect that "state and local governments will remain unable to use their police power to control noise by regulating the *flight* of aircraft?" [Emphasis supplied.]

Curfew which prohibits the take-off of aircraft is undoubtedly a regulation of the flight of aircraft. We urge the Court to recall Section 101 (32) of the 1958 Act, defining flight on aircraft;

An aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.

Virtually every operation of an aircraft is considered to be "flight." Further, the Act intends to regulate not only flight, but aircraft operations as well. Operation of aircraft is defined by 49 USC 101(26):

'Operation of aircraft' or 'operate aircraft' means the use of aircraft for the purpose of air navigation and includes the navigation of aircraft.⁹

Operation, then includes flight of aircraft. The Administrator clearly has exclusive jurisdiction over all aircraft operations on the ground and in flight at the Hollywood-Burbank airport, and a clear intention to preempt can be construed as a part of the 1968 Act.

2. Consideration of the 1972 Act.

The Noise Control Act of 1972¹⁰ contains, among other things, an amendment to Section 611 of the Federal Aviation Act. The change was one of great moment to the FAA, for it gave FAA a partner in

⁹FAA has added a Section 91.10 to its regulations, 14 CFR 91.10, to include within the definition of operation of aircraft the act of taxiing or maneuvering at gates. The new definition was proposed in NPRM 66-36, 31 F.R. 13352, October 14, 1966, and was adopted as amendments 1-13 and 91-43 in 32 F.R. 9640, July 4, 1967, after notice and comment.

¹⁰P.L. 92-574, 92nd Cong. 2nd Sess., October 27, 1972, ____ Stat. ____.

regulating aircraft noise—the Environmental Protection Agency.¹¹ There was no intention to weaken the Federal preemption or allow a greater role on the part of State or local governments with respect to regulation of aircraft noise.

a. The Preemption Section of the 1972 Act.

The preemption section of the 1972 Act is located in Section 6(e), but it does not apply to aircraft noise. Section 6 is discussed in the House Report, and it is expressly stated, in parentheses, that

The preemption provision discussed in this paragraph does not apply to aircraft. See discussion of aircraft noise below. [H. Rep., at p. 8.]

If this preemption in Section 6 applied to aircraft, Appellants would have some basis for arguing that locally imposed curfew would be permitted, for the report specifically states that with respect to non-aircraft noise:

Localities are not preempted from the use of their well-established powers to engage in curfews. . . . [H. Rep., at p. 9.]

The previous language to this citation removes it, however, from consideration.

In amending Section 611 of the 1958 Act, the Committee report states that—

No provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of State and local

¹¹ H. Rep. No. 92-842, accompanying H.R. 11021, 92nd Cong. 2nd Sess., Feb. 19, 1972. The addition of EPA was necessitated to protect the public interest, and to hurry along FAA activity in implementing noise control measures. At p. 8.

governments that existed with respect to matters covered by Section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill. (At p. 10.)

Congress, therefore, did not intend to disturb the preemption with respect to aircraft noise established by the 1968 Act, discussed previously. NBAA would have the Court accept this statement and analysis, and find a Congressional intention in the 1968 and 1972 Acts to preempt the field of aircraft noise regulation.

b. Other Aspects of the Legislative History of the 1972 Act.

The 1972 Act was the subject of much debate. Bills covering the matter were introduced in both houses.¹² The bill finally adopted was the House version,¹³ being marginally different from the Senate version.¹⁴

The House bill was reported out of committee on February 19, 1972, and was passed by the House after a short debate on February 29, 1972.¹⁵ The Senate bill was reported out of Committee on September 19, 1972, and was passed by the Senate on October 13, 1972, but the House bill was adopted on October 18, 1972.¹⁶

It is interesting to note that the House considered the subject of Federally imposed curfew, and rejected it.

¹²Some 11 bills concerning environmental noise were introduced in the House between March 1, 1972, and July 31, 1972.

¹³H.R. 11021.

¹⁴S. 3342.

¹⁵Cong. Rec., 92 Cong. 2nd Sess., H. 1508, Feb. 29, 1972.

¹⁶Cong., Rec., 92 Cong. 2nd Sess., S. 18014, Oct. 13, 1972.
Cong. Rec., 92 Cong. 2nd Sess., S. 18646, Oct. 18, 1972.

Three bills entertaining curfew as a viable answer to the aircraft noise problem were introduced, H. R. 13919, H. R. 16110, and H. R. 15500, but were never reported out of the Committee. On February 29, 1972, the date of the passage of the House Bill, an amendment to it was considered by the House. Congressman Mikva, the author of one of these bills, suggested the amendment which would set up a curfew commission in the area of aircraft noise pollution. The House considered the amendment, and rejected it.¹⁷

The Senate, too, had its rendezvous with curfew. On October 12, 1972, Senator Muskie, a sponsor and co-author of S. 3342, recommended an amendment requiring the Environmental Protection Agency to publish regulations on the issue of aircraft noise. This amendment was rejected.¹⁸

Senator Muskie then proposed a second amendment which would permit states and localities to adopt "more stringent controls" in the noise area and the "ability to enforce them."¹⁹ This amendment was designed to allow the States and local governments to regulate aircraft noise through curfew. Senator Muskie stated that he would not—

¹⁷ Cong. Rec., 92nd Cong. 2nd Sess., H. 1534-1536, Feb. 29, 1972.

¹⁸ Cong. Rec., 92nd Cong. 2nd Sess., S. 17753-17754 and S. 17776, Oct. 12, 1972. It cannot be said that Congress did not entertain the immediate implementation of noise standards by EPA. Therefore, the argument that Congress has not regulated in the field and has not considered regulating cannot stand.

¹⁹ *Ibid.*, at S. 17782.

support Federal preemption which protects product manufacturers and the air transportation industry. . . .²⁰

The amendment was rejected.²¹

Senator Muskie expressed his views on the final version of S. 3342 and H. R. 11021 in a minority statement accompanying the Senate Report on the 1972 Act. In this statement, Senator Muskie makes it clear that he considers the field of aircraft noise to be preempted by Congress.²² He also states that the final version of the Act would prohibit the localities from enacting regulations intending a "modification in hours of airport use."²³ Thus permission for locally imposed curfew was considered by Congress, and rejected.

The legislative history of the 1972 Act is replete with statements that lead to the conclusion that Congress has specifically preempted the area of aircraft noise, and therefore has lodged responsibility in FAA and EPA.

- b. The regulatory scheme with respect to safety and noise control is so pervasive that, in itself, it represents an intention on the part of Congress to preempt the field.

The Court has recognized that air transportation is regulated by a comprehensive scheme, and such regulation is necessitated by the nature of the air transportation industry. See *Chicago and Southern*

²⁰ *Ibid.*, at S. 17784.

²¹ *Ibid.*, at S. 17785.

²² Minority Report on S. 3342, Report No. 92-1160, 92nd Cong. 2nd Sess., Sept. 19, 1972, at pp. 22 and 23.

²³ *Ibid.*, at p. 25.

Airlines v. Waterman S.S. Co., 33 U.S. 103, 68 S.Ct. 431 (1948).

We had discussed the pervasive Federal regulations in the area of conflict with respect to safety and with respect to economic controls. In that section brief mention was made of conflict between noise regulation by FAA and locally imposed measures. We will expand upon that subject in this heading. We will not discuss regulations issued under the 1972 Act for there are none as yet. We recall, though, that an amendment to the 1972 Act requiring EPA to issue regulations was entertained by the Senate and rejected.

We have cited two cases that hold if, in a preempted area, a State or local government is doing more than the Federal government in the way of regulating, the local enactment must still fall. See *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8 Cir. 1971); *Charlestown and W.C.R.R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 35 S.Ct. 715 (1915).

Justice Holmes, Writing for the Court, stated:

When Congress has taken the particular subject matter in hand, coincidence is as ineffective as opposition, and state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.¹ *Varnville, supra*, at pp. 604, 717.

¹ Also see *Napier v. Atlantic Coast Line*, 272, U.S. 605, 47 S. Ct. 207 (1926).

3. *FAA has enacted regulations in the area of noise control.*

In accordance with the mandate provided by the 1968 Act, FAA enacted a new Part to its Regulations, Part 36 (14 CFR Part 36). It was adopted on November 3, 1969, but published in 34 F.R. 18355, Nov. 18, 1969, effective December 1, 1969. Its purpose was to provide noise standards for type certification of subsonic transport aircraft and subsonic turbojet aircraft of any category.

In addition to Part 36, FAA has undertaken the imposition of preferential runway systems, and noise abatement programs tailored to the needs of the individual airports.² There cannot be an adoption of a uniform noise abatement procedures for take-offs and landings across the United States because of the special geographical properties of each locality that would impede such a program.³ However, in the interest of safety of flight, the procedure adopted, though varied from airport to airport, must be imposed by a centralized authority.

Mr. John H. Shaffer, Administrator of FAA, summed up this position in his testimony to the Aviation Subcommittee in 1971.

I remind all of us that the first mission of FAA is the safety of flight. We can reduce noise by redesign of the machine, the airframe, with the power plant, combination in the aircraft. We can work with the communities to consider the "receiver" of the

²Hearings, Subcommittee on Aviation, Senate Commerce Committee, on S. 1016, 92nd Cong. 1st Sess. Part 2, July 12 and 13, 1971, at p. 672. Also see testimony of Roman Lemmer, Appellees App., p. 316 *et seq.*

³*Op. Cit.*, Sen. Hearings, at p. 683.

sound—the people who live nearby. But the changes we make must not compromise the safety, health and welfare of those who fly—the pilots—flight crews, and passengers. Each change, each step, must be tested. *We must ask each time—is this the safe as well as the right thing to do?*⁴ [Emphasis supplied.]

The FAA's regulations may not be as extensive as expected or desired by the City of Burbank, but all the consequences of the curfew must be considered. *Udall v. FPC*, 387 U.S. 428, 87 S.Ct. 1712 (1967). It is suggested that if the remedies promulgated by FAA to date are not stringent enough, application be made to FAA for relief. See *Texas and Pacific R. Co. v. Abilene*, 204 U.S. 426, 27 S.Ct. 350 (1906).

4. *FAA has enacted a comprehensive set of safety rules that pervade the area.*

We need only refer briefly to the fact that FAA has totally regulated operational safety in airspace. FAA type certificates aircraft, aircraft appliances, aircraft products, and aircraft parts (14 CFR Part 21 *et seq.*). FAA provides for complete airworthiness standards for all types of aircraft (14 CFR Parts 23, 25, 27, and 29). It even provides airworthiness standards for manned free balloons (14 CFR Part 31).

Airworthiness standards are prescribed for aircraft engines (14 CFR Part 33); propellers (14 CFR Part 35); and materials parts, appliances and products (14 CFR Part 37. Part 37 sets forth technical standards for production of these items).

FAA has a system for inspection and direction of repairs on all aircraft, engines, propellers, appliances, or

⁴*Ibid.*, at p. 675.

aircraft products (14 CFR Part 39). It prescribes the methodology for maintenance, preventative maintenance, rebuilding or alteration (14 CFR Part 43), and regulates identification and registration markings on all aircraft, engines, propellers, appliances or aircraft products (14 CFR Part 45). Registration of aircraft is covered by 14 CFR Part 47. Recordation of aircraft conveyance and security documents is regulated in 14 CFR Part 49.

Part 61 of the Regulations, 14 CFR Part 61, is devoted to a comprehensive scheme of certification of pilots and flight instruction. Part 63, 14 CFR Part 63, is concerned with flight crew members other than pilots, while 14 CFR Part 65 is involved with airmen other than flight crewmembers. Part 67, 14 CFR 67, sets forth a vast system of medical standards.

FAA regulates the use of airspace in Parts 71 through 77, 14 CFR Parts 71-77, and includes therein designation of airways, low area routes, controlled airspace and reporting points. Jet routes are established, as well as high area routes. Part 77 regulates objects affecting navigable airspace, including obstacles in the area of airports.

Air traffic and general operating rules are found in Parts 91 through 105, 14 CFR Parts 91-105. These parts contain general operating and flight rules, special air traffic rules and airport pattern rules, regulations concerning instrument flying altitudes, standard approach procedures, security control of air traffic, rules pertinent to moored balloons, kites, unmanned rockets and unmanned full balloons, transportation of hazardous materials, and parachute jumping.

Air carriers and those operating in air transportation are controlled by 14 CFR Parts 121-137. Pilot schools are regulated by 14 CFR 141; ground instructors by 14 CFR

Part 143; repair stations by 14 CFR Part 145; aviation maintenance technician schools by 14 CFR Part 147; and parachute lofts by 14 CFR Part 149.

Federal aid to airports and standards thereof are governed by 14 CFR Part 151. Acquisition of U.S. land for public airports is covered by 14 CFR Part 153. Other airport rules are found in 14 CFR Parts 155-159.

By Public Law 91-258, Congress added a new part to the Federal Aviation Act of 1958, Section 612, 84 Stat. 234. That Section provides for the issuance of airport operating certificates to those airports serving air carriers certificated by the CAB, and for the establishment of minimum safety standards for the operation of certificated airports. These standards have not yet been set.

In reporting the bill, H.R. 14465, the House Report considered airport certification and stated:

The airport is an instrumentality of interstate and foreign commerce. It is used by the public and the manner in which it is maintained and *operated* is vital to the public safety. It is in the public interest that the airport be certificated by the Federal Government as to its *adequacy for the safe conduct of flight operations in the national air transportation system.*⁵ [Emphasis supplied.]

⁵H. Rep. 91-601, accompanying H.R. 14465, 91st Cong. 2nd Sess., October 27, 1969, 2 U.S. Code Cong. & Admin. News, p. 3058, 1970.

5. *The CAB has enacted extensive rules regulating commercial air carriers.*

The Civil Aeronautics Board's Rules are extensive and detailed. With respect to air carrier use of an airport, 14 CFR 202.3 requires an air carrier to apply to the Board for authority to use any airport. Section 202.6 (14 CFR 202.6) provides rules with respect to scheduled stops, and any change in service pattern must be authorized through application (14 CFR 202.4). Similar rules apply to Foreign Air Carriers (14 CFR Part 203). Inauguration or suspension of service is required in 14 CFR Part 205. Traffic and routings are regulated by 14 CFR Part 221.

The aviation industry is completely and thoroughly regulated from airport-to-airport. The scheme is so pervasive that an intention to fully occupy the field must indeed be presupposed.

c. *The Subject of Aircraft Noise Is Heavily Involved with Aircraft Safety, and Therefore Demands an Exclusivity of Federal Regulation in Order to Achieve Uniformity Vital to the National Interest.*

It has been stated that even where there is no Federal legislation, in cases where the National interest requires uniformity, Congress occupies the field under the Commerce Clause of the Constitution, *Kelly v. Washington*, 302 U.S. 1, 58 S.Ct. 87 (1937). We have here Congressional enactments, and the regulations of two agencies vitally important to the air transportation industry. The need for uniformity in noise-safety regulation has been expressed many times over in this document and by commentators upon the several statutes involved.

The question in applying the uniformity test is—

Whether the State interest is outweighed by a National interest in the unhampered operation of interstate commerce. *California v. Zook*, 336 U.S. 725, 69 S.Ct. 841 (1949), at p. 728, 843.

The danger of unharmonious systems that will be destructive of a Federal scheme are spelled out in *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 65 S.Ct. 1515 (1945), as well as *Udall v. FPC*, *supra*.

In *Southern Pacific*, *supra*, National uniformity was required in the length of trains passing from State to State. Arizona wanted to, and did by statute, limit the length of trains passing through that State in the interest of safety. The Court, in examining that statute passed as a police power measure, considered the cost of complying, delays in deleting and then adding cars, needs for additional manpower, equipment, inconvenience to travellers, and delays in mail and freight, and concluded that the statute would disrupt a requisite National uniformity.

We have much the same circumstances here. We have considered *Southern Pacific* above from the point of conflict, but it is as applicable from the point of view of required uniformity. Just as a local statute requiring trains to be shorter than they normally are would cause delays, so would the Burbank type of ordinance. The Burbank type of ordinance would disrupt cargo shipment, the mails, and would cause inconvenience. If curfew were permitted by anyone other than a centralized authority, safety would be disrupted. More equipment would be required. Pilots who can fly only so many hours without rest⁶ would not be able to take out a diverted flight the next day after meeting with curfew.

⁶14 CFR §121.471 *et seq.*

This would necessitate an expansion in staff on the part of air carriers. Maintenance schedules would be disrupted, and traffic would be severely hampered and disrupted. The same reasons for striking down the Arizona statute exist with respect to the Burbank Ordinance.

When Congress decides uniformity is necessary, State laws must not be allowed to interfere, *Hines v. Davidowitz, supra*. It appears to NBAA, based upon its evaluation of the Federal Aviation Act of 1958, the 1968 amendment adding Section 611, and the 1972 Act amending Section 611, that the Federal Government indeed has required uniformity.

d. The Burbank Ordinance Stands as an Obstacle to the Accomplishment and Execution of the Full Purposes and Objectives of Congress.

The analysis submitted to this point clearly demonstrates that the Federal Government has expressly preempted the field of aircraft safety regulation. It has been established that the Burbank Ordinance, and those that will follow it, are disruptive of a fragile though comprehensive scheme of air traffic regulations that requires uniformity and harmony in its maintenance. The noise legislation discussed and its history show at least an implied intention to preempt. Summing it up, this Court must conclude that the Burbank Ordinance stands as an obstacle to the full implementation of a carefully conceived Federal program.

POINT II

THE ORDINANCE OF THE CITY OF BURBANK AND SIMILAR CURFEWS CURTAILING OPERATIONS AT AIRPORTS CONSTITUTE A REGULATION OF INTERSTATE COMMERCE THAT IS NEITHER INDIRECT NOR OF INCIDENTAL BURDEN THEREUPON.

The regulation of airspace is clearly based upon Congressional authority to regulate interstate commerce under the Commerce Clause, U.S. Constitution, Art. I, Section 8, Clause 3. All aviation utilizing navigable airspace is therefore in interstate commerce.¹ NBAA, however, will direct its attention not to the Sunday or pleasure fliers, but to the Nation's air carriers and its own membership.

A. The Air Transport Industry.

In 1970, it was found by Congress that—

The air transport industry provides a significant contribution to the Nation's economy. Operating revenues of the scheduled carriers in 1968 amounted to over \$7.75 billion. This was more than double to \$3.76 billion generated on 5 years earlier. Total assets of the industry increased from \$4.1 to \$11 billion during the same period.

In terms of employment, the scheduled airline industry directly provided over 300,000 jobs at the end of 1968, a two-thirds increase over the employment level of 1963.

¹Hearings on S.3880, Subcommittee on Aviation, Senate Interstate and Foreign Commerce Committee 85th Cong. 2nd Sess., May and June 1958, p. 333.

The vital and growing role of air carriers in the Nation's Commerce is apparent from the 72.5 per cent of intercity common carrier passenger miles in 1968 which were travelled by air. This compares with only 39.3 percent some 10 years earlier. The predominance of air [travel] [sic] in overseas travel has grown to the point wherein 1968 more than nine out of every 10 overseas travellers chose air.²

ATA Vice President Clifton Von Kann testified at the trial below.³ He indicated that in 1969, the Nation's air carriers transported 150,000,000 passengers utilizing 2400 aircraft, about 1900 of which were jets. He further indicated that 4.7 billion cargo-ton miles were flown.⁴ Movement of passengers involves interstate commerce, in and of itself, *Edwards v. California*, 314 U.S. 160, 62 S.Ct. 164 (1941).

B. Business Aviation.

In NBAA's statement on the "interest of the Amicus", some facts were presented concerning the role of business aviation in air transportation. Those remarks are incorporated herein without repeating them. We would just add that business aviation is not only in interstate commerce because business aircraft utilize the airways. Business aviation is in interstate commerce because the aircraft of businesses are transporting officers and employees of these corporations which are heavily engaged in interstate commerce.

²H. Rep. No. 91-601, 91st Cong. 2nd Sess., Oct. 27, 1969, 2 U.S. Code Cong. and Ad. News 3047 (1970), at 3052.

³Appelles App., 246 *et seq.*

⁴*Ibid.*, at pp. 248, 249, 250.

When the Federal Aviation Act of 1958 was originally considered, NBAA participated.⁵ Mr. W.K. Lawton testified that at that time there were about 26,000 business aircraft, 2,500 of which were multi-engined aircraft. Business aviation users were ahead of the airlines in operating jet aircraft.⁶ The growth of business aviation has been tremendous, and has been recognized by FAA.

C. Pacific-Southwest Airlines Is Operating In Interstate Commerce.

Appellants have taken the position and made much ado about the fact that only corporate jet operations and one intrastate flight of PSA are affected by the Burbank Ordinance. We have pointed out that the corporate operations are involved in interstate commerce. It is further submitted that PSA is in interstate commerce.

The CAB does not regulate PSA because its operations do not extend beyond the State of California. This means that PSA is not regulated by CAB. It does not mean that PSA is not in interstate commerce. PSA's employees fall under the Railway Labor Act. The airline utilizes airways regulated by FAA. The airline is operated under Part 121 of the Federal Aviation Regulations. Its pilot employees are certified by FAA. Its aircraft will be regulated by Part 36, 14 CFR Parts 121, 61, 67 and 36. The mere fact that PSA operates intrastate is not dispositive of whether or not it is interstate commerce. *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 62 S.Ct. 491 (1942).

⁵See statement of W. K. Lawton, Executive Director, NBAA, Hearings on S. 3880, Aviation Subcommittee, 85th Cong. 2nd Sess., May and June, 1958, at p. 301 *et seq.*

⁶*Ibid.*, at pp. 302, 308 and 316.

D. Operations at the Hollywood-Burbank Airport.

The Hollywood-Burbank airport handled 1,178,000 passengers in 1969.⁷ PSA airport operates flights into and out of the airport, as well as Air West, Continental, United, and Western Airlines. These airlines are certificated by the CAB. Air West and Continental utilize the airport directly, as does PSA, while United and Western are designated to utilize the airport as an alternate to Los Angeles International Airport.⁸ It was estimated the Hollywood Burbank airport was used as an alternate for 140 flights, or about 470 hours of such use.⁹

Continental Airlines is certified by the Civil Aeronautics Board to operate into and out of the airport, utilizing Boeing 727-200 aircraft. Many of the flights conducted are interstate in nature,¹⁰ between Burbank and Portland, and Seattle.¹¹ No testimony was presented by Air West, United or Western.

The corporate jet operations at the airport were estimated at 275 each month, with 60 or so taking place at night.¹²

⁷ Appellees App., p. 142.

⁸ *Ibid.*, pp. 148-150.

⁹ *Ibid.*, pp. 150-151.

¹⁰ *Ibid.*, pp. 205-206.

¹¹ *Ibid.*, p. 207.

¹² *Ibid.*, p. 149.

E. Effect of Burbank Curfew.

It was stated at the trial below that the Burbank curfew would immediately affect one flight of PSA which departed Hollywood-Burbank Airport for San Diego at 11:30 P.M. This flight averages 125 passengers out of Burbank, 80-85 originating there. Most of these passengers are military personnel.¹³ The curfew would require the incoming aircraft to land not at Hollywood-Burbank, but at Los Angeles. Passengers incoming to Burbank would have to be bussed to Burbank. Those going to San Diego from Burbank would have to be bussed to Los Angeles.¹⁴ PSA would suffer in the area of maintenance as well, as the aircraft would be needed at San Diego for maintenance. The delay caused by PSA going to Los Angeles because of the Burbank situation would be destructive of this end. The total loss to PSA in complying with the curfew would be in the area of \$6,500 a trip.¹⁵ PSA would have to change 9 or 10 departure times to comply with the Burbank Ordinance.¹⁶

Continental would be restricted from operating an intended Southbound flight from Seattle at 8:00 P.M. Los Angeles Airport could not be used, as Continental's CAB authorization does not authorize a Seattle-Los Angeles route.¹⁷ None of Continental's present flights would be affected.

¹³ *Ibid.*, pp. 75-75.

¹⁴ *Ibid.*, p. 77.

¹⁵ *Ibid.*, pp. 77-81.

¹⁶ *Ibid.*, p. 96.

¹⁷ *Ibid.*, Tr. 213.

F. Effect of Implementation of Similar Curfews at Other Airports, Nationwide.

Mr. James L. Mitchell, testifying on behalf of Continental, estimated that a curfew similar to the Burbank curfew in Portland alone would cause the cancellation of its Northbound flights to Portland or Seattle out of Burbank or Ontario, California, after 7:00 P.M.¹⁸ A nationwide curfew between 11:00 P.M. and 7:00 A.M. would cause the cancellation of 48 of Continental's departures.¹⁹ It would be disruptive of maintenance and result in considerable economic penalty.²⁰ Mail and freight is mostly carried at night, departures occurring between 10:00 and 11:00 P.M.²¹ It was estimated that such a curfew would prevent Continental from adequately serving its passengers, carrying mail in accordance with its postal contracts, and would be disruptive of its cargo service. Continental would have to cancel 15% of its aircraft miles flown or 30,000 miles a day, or 28 flights a day cancelled. 14.9% of the cargo flights would be lost.²² Net operating cost would increase 25% due to loss of night flying capacity, need for six new aircraft at a cost of 5-7 million dollars each and loss of revenues.²³

Clifton Von Kann, of ATA, estimated that the rate of return on equity investment for the airlines in 1969-1970 was less than 1%, and that nationwide curfew would be

¹⁸ *Ibid.*, p. 215.

¹⁹ *Ibid.*, p. 217.

²⁰ *Ibid.*, pp. 219-220, 230.

²¹ *Ibid.*, p. 218.

²² *Ibid.*, pp. 231-235.

²³ *Ibid.*, p. 235.

considered financially catastrophic by the airline industry.²⁴ Congestion alone, without curfew, would cost the airlines about \$1,500,000 in 1970.²⁵ National curfew ordinance would result in the cancellation of an estimated 1009 flights, and would have a major effect on the carriage of cargo and mail, as half the mail would be delayed.²⁶ Scheduling changes from the cancellations would involve massive disruption.²⁷

James T. Pyle, a former Administrator of CAA, and Deputy Administrator of FAA, testified that in 1966, his group known as the Aviation Development Council at LaGuardia Airport considered curfew from 12:00 Mid-night to 7:00 A.M. in 1966. This sort of curfew was abandoned, for it would constitute an "untenable burden on air commerce."²⁸ It was estimated, as a result of Mr. Pyles' 1966 study on curfew, that 1107 weekly services would be cancelled, and 1370 odd operations would be discontinued, for a total elimination of 2474 operations each week.²⁹ Of these operations 607 were all-cargo.

G. The District Court's Findings.

The Court below found that curfew ordinances similar to the Burbank Ordinance "would promptly be adopted by virtually all cities surrounding airports." It was upon this assumption that the Court concluded that the curfew

²⁴ *Ibid.*, pp. 251-252.

²⁵ *Ibid.*, p. 253.

²⁶ *Ibid.*, p. 266.

²⁷ *Ibid.*, pp. 259-266.

²⁸ *Ibid.*, pp. 283-284.

²⁹ *Ibid.*, p. 286.

in question as an unconstitutional burden on interstate commerce. The 9th Circuit did not reach this question.

The Court below has been criticized for speculating upon the adoption of curfew by other cities. The assumption, though, is reasonable. Curfew has been enacted by a judge in New Jersey,¹ a court in Arizona,² and recently, by another New Jersey Court.³ A lawsuit asking for a curfew at White Plains, Westchester County Airport has been threatened by the Town of Greenwich, Connecticut.⁴

The natural consequences of supporting the Burbank Ordinance is an appropriate consideration for the Court. *Udall v. FPC, supra; Northern States Power Co. v. Minnesota, supra.*

In *Northern States, supra*, Chief Justice Matthas opined that—

Were the States allowed to impose stricter standards on the level of radioactive waste released they might conceivably be so over-protective in the area of health and safety as to unnecessarily stultify the industrial development and use of atomic energy for the production of electric power.

Just as Justice Matthas engaged in carrying the matter before him to its logical conclusion, so did the Court below. The Court's foresight should be the subject of commendation, not criticism.

¹ *Township of Hanover v. Town of Morristown*, 108 New Jersey Super. 461, 261 A.2d 692 (1969).

² *Williams v. Superior Court of Arizona*, ____ P.2d ____ (1972).

³ *Parachutes, Inc. v. Lakewood*, ____ N.J. Super. ____, ____ A.2d ____, (1972), 12 *Avi. Law Reports* 17,623.

⁴ *News Week*, June 15, 1972, at p. 82.

H. The Case Law Tests.

A State law may not be struck down merely because it affects interstate commerce in some way. *Head v. New Mexico Board of Examiners*, 374 U.S. 424, 83 S.Ct. 1759 (1963); *Huron Portland Cement v. Detroit*, *supra*. But "no State may completely exclude Federally licensed commerce. . . ." *Florida Lime and Avocado Growers*, *supra*, at p. 142, 1217; *Huron*, *supra*. States may regulate those subjects which, because of their number or diversity, may never be adequately dealt with by Congress, but—

... [E]ver since *Gibbons v. Ogden* [citation omitted], the States have not been deemed to have authority to impede *substantially* the free flow of commerce from State to State, or to regulate those phases of national commerce which, because of the need of national uniformity demand that their regulation, if any, be prescribed by a single authority. *Southern Pacific Co. v. Arizona*, *supra*, at p. 767, 1519.

State statutes which bring to bear a burden on interstate commerce have been held to violate the Commerce Clause. *Minnesota Rate Cases*, 230 U.S. 352, 33 S.Ct. 729 (1913); *Mississippi R. Commission v. Illinois Central R. Co.*, 203 U.S. 335, 27 S.Ct. 90 (1906).⁵

⁵In the *Illinois Central* case, *supra*, a State regulation requiring interstate passenger trains to stop at a specific town, at a specific time, although otherwise served, was held to be violative of the Commerce Clause. If the Commission could order stoppage at this town, the Court opined that it could order other stoppages, and this would be disruptive of interstate commerce. Also see *Seaboard Air Line R. Co. v. Blackwell*, 244 U.S. 310, 37 S.Ct. 640 (1917), where a State statute ordering trains to slacken speed within 400 yards of each railway crossing in the State of Georgia was held to be a burden on interstate commerce.

A State may provide for the health, safety and morals of local concern, although interstate commerce may be incidentally or indirectly involved. *Minnesota Rate Cases*, *supra*; *Louisville and Nashville R. Co. v. Kentucky*, 183 U.S. 503, 22 S.Ct. 95 (1901); *Savage v. Jones*, 225 U.S. 501, 32 S.Ct. 715 (1912); *Lakeshore and M.S.R. Co. v. Ohio*, 173 U.S. 285, 19 S.Ct. 465 (1899).⁶

The test developed by this recitation is that the States may impinge, under their police power, upon interstate commerce, if the enactment does not disturb a required national uniformity, disrupt free passage in navigable waterways, exclude federally licensed activity, substantially impede or directly burden the free flow of interstate commerce, directly conflict with an act of Congress, or invade a Federally preempted area.

NBAA has demonstrated that the Burbank Ordinance is acting in a preempted area, in direct conflict with Federal enactments.

It has also been shown that the area of aircraft safety and aircraft noise control require uniform action at the Federal level.

These factors aside, it is also true that the Ordinance directly and substantially burdens interstate commerce. The Burbank curfew, applied in Burbank alone, materially effects the operation of corporate operators at

⁶An Ohio statute required at least three passenger trains belonging to one company, passing through the State, to stop at each city or town of 3,000 people or more. The Court held that there was no violation of the Commerce Clause, as *no trains were required to turn aside from its direct route*. The Burbank Ordinance would cause a considerable amount of "turning aside" of through flights if the case were to turn on the Burbank curfew alone. If applied nationally, 1009 operations would be "turned" from their direct route by way of out-and-out cancellation.

the Airport. PSA, involved heavily in interstate commerce, is interfered with to the extent of \$6500 weekly, and is prohibited from instituting any flights after 11:00 P.M. or before 7:00 A.M. Continental Airlines, an interstate carrier, may not institute interstate through flights originating in cities it is licensed to serve so that they will arrive in Burbank after 10:00 P.M. The same is true for Air West. Airlines permitted to utilize the Hollywood-Burbank Airport as a reliever airport may not do so for through flights after 11:00 P.M. or before 7:00 A.M.

Applying the curfew across the nation, carriage of mail will be disrupted, affecting interstate commerce on a grand scale. Cargo operations will be disrupted, massive losses will accrue to the airlines because of as many as 1009 flight cancellations. The safety of the flying public will be endangered. The Ordinance and impending curfew by other localities certainly would not have a merely incidental or indirect impact on interstate commerce. They would be entirely disruptive of it.

In our search, we could uncover only one case dealing with the Commerce Clause that permitted a disruption in interstate commerce by a State statute enacting legislation effectuating noise control. We refer to *Hennington v. Georgia*, 163 U.S. 299, 16 S.Ct. 1086 (1896). Even though the case is quite old, it should be discussed and distinguished. NBAA asks that the case be directly overruled, as its holding applies to interstate commerce.

In *Hennington*, *supra*, freight trains passing through the State of Georgia were prohibited from operating on Sunday due to a disruption of the Sabbath peace. The dissent in the case pointed out that the Court's holding established the right of the State to interfere with interstate commerce on a weekly basis.

We have traced citations to the *Hennington* case, *supra*, to determine whether it in fact represents the law with respect to the instant case. We have determined that it does not.

The case is last cited in 1961 as a Sunday Blue Law case and has not been cited since. *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101 (1961), separate opinion, 366 U.S. 420, 81 S.Ct. 1153, and dissenting opinion, 366 U.S. 520, 81 S.Ct. 1218. It is cited in *Huron*, *supra*, for its test of burden on interstate commerce, which is the accepted test developed above. In *Southern Pac. Co. v. Arizona*, *supra*, it is cited in the dissent for some of its language and not its holding. See 325 U.S. 780, at p. 785.

Hennington is cited in *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511, 55 S.Ct. 497 (1935), at p. 525, 501, for the proposition that a State may protect its residents against unnecessary noise. The case, though, adopts the direct burden on interstate commerce test. *Hennington* was held not to be a direct burden case. That is surely not the case here. In addition, while aircraft noise is unpleasant, it cannot be equated with noise in the area of a hospital, or a jackhammer's noise. Closing a street to traffic near a hospital or shutting down a plant for certain hours does not affect safety. Furthermore, it is clear from *Hennington*, *supra*, that the case is not a noise case, but rather the validation of a State's right to preserve and protect the Sabbath. The Court in *Hennington* further found that there was no Congressional legislation on the subject of regulation of freight trains. Our references to legislation, Congressional intention in both the noise and safety area, and pervasive regulation must surely distinguish the *Baldwin*, *supra*, reference to *Hennington*.

Hennington is considered as a case dealing with incidental burden on commerce in *Louisiana v. Texas*, 176 U.S. 1, 20 S.Ct. 251 (1900), at p. 24, 259, and as a Blue Law case in *Pettit v. Minnesota*, 177 U.S. 164, 20 S.Ct. 666 (1900).

Erie Railroad v. Purdy, 185 U.S. 148, 22 S.Ct. 605 (1902), considered it an intrastate regulation case. In *Reid v. Colorado*, 187 U.S. 137, 23 S.Ct. 92 (1902), it is cited for the proposition that State regulation conflicting with Federal enactments will cease to have any effect. *Hennington* is a police power case according to *Chicago, B & Q R. Co. v. Illinois*, 200 U.S. 561, 26 S.Ct. 341 (1905). In *Howard v. Illinois C.R. Co.*, 207 U.S. 463, 28 S.Ct. 141 (1907), *Hennington* is cited as a supremacy case. It is a police power case that incidentally affected interstate commerce in *New York N.H. R. Co. v. N.Y.*, 165 U.S. 628, 17 S.Ct. 418 (1897), and a supremacy case in *Gladson v. Minnesota*, 166 U.S. 427 (1897).

In *Savage v. Jones*, *supra*, *Hennington* is considered to be a case that only incidentally affected interstate commerce, for it did not conflict with Federal legislation, as it was in *Standard Stock Food Company v. Wright*, 225 U.S. 540, 32 S.Ct. 784 (1911). In *Barrett v. N.Y.*, 232 U.S. 14, 34 S.Ct. 203 (1914), it is cited, and it is stated that—

exertion of the power essential to assure needed protection to the community may extend incidentally to the operations of a carrier in its interstate business, provided it does not subject that business to unreasonable demands and is not opposed to Federal legislation. At p. 31. [Emphasis supplied.]

Hennington is cited in *Atlantic Coast Line R. Co. v. Georgia*, 234 U.S. 280, 34 S.Ct. 829 (1914), wherein it is indicated that State statutes that conflict with presumed will of Congress "must be required to give way to the supreme authority of the Constitution," at p. 292.

We find *Hennington* again in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524 (1917), at p. 245, wherein it is declared that State statutes not conflicting with acts of Congress, and only incidentally burdening commerce, may stand. It is distinguished in *Robertson v. California*, 328 U.S. 440, 66 S.Ct. 1160 (1946), and is cited in *Sampson v. Shepard*, 230 U.S. 352, 33 S.Ct. 729 (1912), as a case which stands for the proposition that local regulation, incidentally affecting commerce, and not in conflict with Federal regulation, may stand.

The case may be found in numerous lower court decisions, demonstrating the range developed above.⁷ One such decision, *Crown Kosher Super Market of Mass., Inc. v. Gallagher*, 176 F. Supp. 466 (D.C. Mass. 1959), notes that—

this is a pretty old case, which was decided before the modern development of limitations upon powers of the states implicit in the fourteenth amendment. At p. 477.

From the listing above, it emerges as clear that *Hennington* is an old case, decided not only before

⁷*Gonzales v. Porto Rico*, 51 F.2d 61 (1 Cir. 1931); *Wrigley Pharmaceutical Co. v. Cameion*, 16 F.2d 290 (DC MD Pa. 1926), *Zayre of Georgia, Inc., v. Marietta*, 416 F.2d 251 (5 Cir. 1969), dissent at p. 255; *Two-Guys From Harrison v. McGinley*, 179 F. Supp. 944 (DC ED Pa. 1959); *Cobb v. Dept. of Public Works*, 60 F.2d 631 (DC Wash. 1932); *Town of Green River v. Fuller Brush Co.*, 65 F.2d 112 (10 Cir. 1933).

modern developments, but at a time when Congress had not yet fully invaded the field of regulating rail transportation. Despite that, the case is wrong-headed. It is inconceivable that today it would be decided the same way. To halt all rail traffic through a state on a given day of the week runs contrary to dozens of later court opinions. If a state cannot slow down trains passing through the state, *Seaboard Air Line R. Co.*, *supra*; require it to stop at designated towns, *Illinois Central*, *supra*; or regulate the length of trains, *Southern Pac. Co.*, *supra*; how can a State halt all transportation by rail through it for an hour, much less a day. It is submitted that *Hennington*, a case of another day and age, ignored by this court since 1961, be relegated to its consigned place in history, undisturbed by further arousal.

It must be found that the Burbank Ordinance clearly imposes an intolerable burden on interstate commerce for the reasons contained in this point. This conclusion is unescapable.

CONCLUSION

NBAA asks of the Burbank Ordinance: "Is it safe, as well as the right thing to do?"⁸ We urge the Court to allow the authorities best suited to answer this question to provide the answer. Congress has empowered FAA and EPA to regulate aircraft noise. We urge that the two

⁸Hearings, Subcommittee on Aviation, 92nd Congress 1st Sess., Part 2 July 12 and 13, 1972, remarks of John H. Shaffer, Administrator, FAA, at p. 675.

Courts below be affirmed in each and every aspect of their decisions.

Respectfully submitted,

**NATIONAL BUSINESS
AIRCRAFT ASSOCIATION**

By: Robert D. Powell

Attorney for NBAA

POWELL & BECKER
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APPENDIX

Exhibit 1

[Filed May 17, 1971]

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744 Broad Street

Newark, N.J. 07102

(201) 623-1754

Attorneys for

Applicants for Intervention

TOWNSHIP OF HANOVER, etc., et al.,

Plaintiffs,

v.

TOWN OF MORRISTOWN, etc., et al.,

Defendants,

and

THE NATIONAL BUSINESS AIRCRAFT:

ASSOCIATION, INC., etc., et al.,

Applicants for Intervention.

: SUPERIOR COURT OF
 : NEW JERSEY CHANC-
 : ERY DIVISION-MORRIS
 : COUNTY

Docket No. C-3172-68

**AFFIDAVIT OF
LAWRENCE P. BEDORE**

DISTRICT OF COLUMBIA)

CITY OF WASHINGTON) ss:

I, LAWRENCE P. BEDORE, being duly sworn according to law, upon my oath do depose and say:

1. I am employed by The National Business Aircraft Association, Inc. as its Manager of Airport Services. I am authorized to make this affidavit on its behalf.

2. The National Business Aircraft Association, Inc. (hereinafter "NBAA"), which was incorporated under the laws of the State of New York in 1947, has, except for a

registered agent in New York, its only office in Washington, D.C. at 425 13th Street. It exists to protect and promote the business aviation interests of the 840 member companies located throughout the United States and to assure the highest standards of safety and efficiency in the aviation operations of its members. NBAA member companies operate some 2300 aircraft, including more than 600 jet aircraft, for business purposes. (Directory as Exhibit 1).

3. Virtually all non-military, non-commercial jet aircraft in the United States are business aircraft owned by corporations, most of which are members of the NBAA. To the best of my knowledge, the jets that use Morristown Municipal Airport, whether as a fixed base or as transients, are owned by members of the NBAA.

4. NBAA was authorized by its Board of Directors to seek intervention in this action. Our intervention was encouraged by many other national organizations and associations who are concerned with the outcome of the case but are not as vitally interested as the NBAA. (See paragraph 17, below).

5. Business aircraft tie Main Street America to the entire world of commerce. While the scheduled air carriers serve 515 airports in the 48 conterminous states, business aircraft can and do use thousands of the nation's more than 11,000 airports. As business decentralizes, thereby helping to revitalize the rural areas of the nation, the business aircraft become an even more essential mode of national transportation.

6. Business aircraft are tools of management which provide top executives with frequent face to face personal contacts and an increased organizational span of control. These aircraft provide flexible national trans-

portation to busy executives and frequently make five or more business stops in a single day.

7. Business aircraft allow management to go when and where they need to keep pace with the continuing growth and geographical dispersion of successful business operations. The privacy and on-board facilities provided on most business aircraft allow conduct of business and preparation of documents while flying between intermediate points.

8. A user survey made in 1966 by Arthur D. Little, Inc., engineering consultants of Cambridge, Massachusetts, for Lockheed-Georgia, a manufacturer of business aircraft, showed that company aircraft were used mainly for executive and staff travel, because relatively few skilled managers are available to any one company to make top decisions and, in terms of responsibility and geography, their span of control must cover large areas of the organizational structure.

9. NBAA member companies place great importance on safety and reliability in their aircraft operations. All corporate aviation departments have established rules for safety which comply with and in many instances exceed the rigid requirements set by the Federal Aviation Administration (hereinafter "FAA"), the federal regulatory body charged by statute to govern the safe and efficient use of the national airways. Pilots of NBAA members have amassed more than one billion miles of safe flying. This is an enviable record which is annually increasing in mileage and in the degree of increased safety.

10. Pilots and crew members of business aircraft bear a heavy burden of responsibility. Consequently, only well qualified pilots are selected and employed as pilots for

these aircraft. These full-time pilots of NBAA members possess outstanding qualifications and technical competence to safely and efficiently operate the most complex, sophisticated aircraft and their related equipment. A recent survey, taken from membership data cards, of the types of FAA certificates held by 831 NBAA member Chief Pilots showed the following:

Type of FAA Certificate	Pilot Possessing Certificate	% of Total
Airline Transport Pilot	450	54%
Commercial Instrument Pilot	217	26%
Instructor Pilot	126	15%
Commercial Pilot	<u>38</u>	<u>5%</u>
TOTAL	831	100%

The same survey showed the following on 1856 pilots, other than Chief Pilots, for NBAA member companies:

Type of FAA Certificate	Pilot Possessing Certificate	% of Total
Airline Transport Pilot	911	49%
Commercial Instrument Pilot	554	30%
Instructor Pilot	150	8%
Commercial Pilot	<u>241</u>	<u>13%</u>
TOTAL	1856	100%

11. The Airline Transport Pilot Certificate requires the most rigid pilot qualifications as outlined by the Federal Air Regulations of the FAA. Pilots in command of air carrier aircraft are required by the FAA to possess this certificate. The competence and professionalism of

NBAA member pilots is numerically shown by the fact that 54% of the Chief Pilots and 49% of the regular line pilots possess this coveted certificate.

12. The qualifications of the pilots of NBAA members based at Morristown Municipal Airport (hereinafter "MMU") surpass those reported in the all member survey mentioned in paragraph 10. Of the 14 pilots of NBAA members based at MMU, 12 possess the Airline Transport Pilot Certificate and the remaining two possess the Commercial Instrument Pilot Certificate. In addition, these 14 pilots have amassed more than 30,000 jet flying hours, much of which was flown in the high aeronautical density areas of our nation and, in the case of some of these pilots, around the globe.

13. NBAA members place great importance on maintaining the proficiency of their pilots and other crew members. Most of the NBAA members require continuous pilot training programs and much of this training is accomplished by outside professional organizations, such as the renowned Flight Safety, Inc., Marine Air Terminal, La Guardia Airport, New York. All are required to comply with the FAA Regulations.

14. NBAA first became aware of the *Hanover v. Morristown* litigation, to the best of my knowledge, on March 11, 1970, following a telephone conversation initiated by Edward F. Broderick, attorney for defendant, to Robert B. Ward, then Executive Vice President of NBAA. The conversation was reported to me as being one of broad generalities and Mr. Ward responded the next day with a letter, three copies of the NBAA Noise Abatement Program and one copy of AIAA (American Institute Aeronautics & Astronautics) Paper No. 69-1123 (Exhibits 2 and 3, respectively).

15. On March 11, 1970, NBAA sent out to all its members a reissuance of its jet noise abatement procedures in a form to be included in the pilot's "Jeppesen" flight kit. This was also sent to airport manager members of the American Association of Airport Executives and the Airport Operators Council International, two organizations of airport managers. The reissuance was motivated by the desire of NBAA and its members to be "good neighbors" with the communities surrounding airports.

16. In the Spring and Summer of 1970, the NBAA undertook to study the noise abatement problems at Morristown Airport, and I personally made several visits to the Airport. The NBAA developed noise abatement procedures including a "minimum sound track" for Morristown, and after final approval by the FAA, the NBAA had it widely circulated (a copy of the procedures and the minimum sound track is attached hereto as Exhibit 4) in August, 1970.

17. The NBAA also met on many occasions with and studied the problems with other interested groups such as the FAA, the Air Transport Association of America, the Port of New York Authority, the Morristown Airport management, and various national organizations concerned with aviation operations.

18. The NBAA cooperated closely with the FAA in the development of the FAA Tower Bulletin which sets forth the official preferential runway system (attached hereto as Exhibit 5). The NBAA also cooperated with the Morristown Airport in the development of Rules and Regulations for tenants to abate noise (attached hereto as Exhibit 6).

19. During the period January 1, 1969 through March 23, 1970, three NBAA members operating five jet aircraft based at MMU conducted a total of 1406 operations (702 take-offs and 704 landings) at MMU, which was less than 1% of all operations at MMU. This amounts to an average of slightly more than 3 (3.179) landings or take-offs per day. Of the 702 take-offs, 148 occurred before 7 A.M. and 6 occurred after 9 P.M. Of the 704 landings, 16 occurred before 7 A.M. and 96 occurred after 9 P.M. A total of 266 operations (154 take-offs and 112 landings) would have been affected had the operational limitations of the Court Order been in effect during this period. These 266 operations amount to approximately 19 percent (18.918%) of total operations at MMU of these three NBAA members during this nearly 15 month period.

20. Sample surveys of the effects of the operational limitation of the Order have been taken from NBAA members at MMU. For the period March 24, 1970 through August 17, 1970, the logs of three jet aircraft based at MMU show that on 35 different occasions these aircraft were forced to land at another airport instead of MMU, remain overnight and return the aircraft to MMU on the following day because of the operational limitations. In effect, this meant that 70 additional landings and takeoffs were made in the high density New York area while not reducing the number of operations at MMU. On 11 other occasions these three aircraft had to relocate the day before at another New York area airport so that they could perform scheduled departures during the Court limited hours at MMU.

21. A report from another NBAA member operating one jet aircraft which is based at MMU showed the following for a five-month period from March 23, 1970

to August 30, 1970. On four occasions it was necessary to reposition the aircraft at Teterboro on Saturday to accomplish scheduled Sunday departures. On three other occasions it was necessary to depart MMU on Sunday between 1 and 3 P.M. non-restricted operational hours and relocate the aircraft at another New York area airport to meet early flight departures on Monday mornings. And on three other occasions the aircraft arrived in the MMU area after 9 P.M., had to land at Teterboro or Newark, leave the aircraft there overnight, and return the aircraft to MMU the following morning. Again, all of the above resulted in no reduction in operations at MMU, but in additional landings and take-offs in the New York high density area.

22. The imposition of operational limitations by the Court, such as the one presently in effect at MMU, reduces the flexibility and efficiency of business aircraft operations which serve an essential purpose for the economy of the Country. NBAA member aircraft based at MMU fly to many points in the nation as well as to many points on the North and South American continents. The reduction of operating hours at the home base of these jet aircraft, not only imposes inconveniences, increases the expenses of the company owning the aircraft, and negates the many advantages of owning business aircraft, but it also restricts their use in interstate commerce. In addition, the diversion of some NBAA member aircraft from MMU has adversely effected the operations of other NBAA members at neighboring airports.

23. The NBAA and its members depend on the FAA to provide a uniform, safe and efficient management of the national airspace. If the FAA's management of the airspace does not remain exclusive, it will adversely affect

the operations of all users of the airspace and thereby those who depend on air transportation.

24. At least one NBAA member company's aircraft has been based at the Morristown Municipal Airport since 1951. Presently there are five NBAA members based at Morristown and one company which controls another NBAA member company has recently moved its Fanjet Falcon to the Morristown airport. These companies are presently operating eight jet aircraft. Approximately \$400,000 has been invested by one of NBAA members in fixed assets on the airport premises and further investment is anticipated depending upon the status of the present jet aircraft operational restrictions.

25. The five NBAA members at Morristown employ a total of 14 pilots and 15 other personnel (Administrative, mechanics, dispatchers, etc.) to staff the five aviation departments. Corporate members with aircraft based at Morristown have plants in Paterson, Passaic, and Madison employing several hundred (approximately 500) employees. In addition, one member company has its corporate headquarters at Morris Plains and approximately 2200 people are employed at this facility.

26. In the New York area (New York, New Jersey and Connecticut) there are 160 NBAA members who operate a total of 436 aircraft. Membership and aircraft, as extrapolated from the 1970 NBAA directory, are distributed as follows:

<u>State</u>	<u>NBAA Member Companies</u>	<u>Jets</u>	<u>Turbo- props</u>	<u>Piston</u>	<u>Total Aircraft</u>
New York	109	98	61	124	283
New Jersey	35	43	31	39	113
Connecticut	<u>16</u>	<u>10</u>	<u>5</u>	<u>25</u>	<u>40</u>
TOTAL	160	151	97	188	436

27. The aviation industry is striving to reduce both noise and air pollution produced by jet aircraft. The ATA has recently issued a booklet outlining its 15 year effort to curb air pollution from aircraft. The concern of the Business Jet division of Pan American World Airways to market an aircraft with a low noise emitting quality is a matter of record. The Fan Jet Falcon is presently the only jet aircraft which meets both the take-offs and approach noise limits for new aircraft of Part 36 of the Federal Air Regulations (Exhibit 7) and 5 of the 8 MMU based jet aircraft are Falcons. The ten point program for effective jet noise abatement outlined by The Jet Center and addressed to all flight crews operating jet aircraft into the Los Angeles area is another example of the aviation industry's concern about airport neighbors on a nationally uniform scale.

28. NBAA has and will continue to work toward an improved and environmentally acceptable solution to the problems of air and noise pollution throughout the nation. NBAA's more recent concern is expressed in its February 19, 1970 letters to the major aircraft engine manufacturers and the American Petroleum Institute. (Exhibits 8 and 9 respectively). The efforts of NBAA and its New York members working with the FAA to increase the maneuvering altitudes for jet aircraft operating into and out of the New York area airports has done much to reduce aircraft noise to all residents of the metropolitan area. NBAA's March 2, 1971 comments to the FAA proposal for the retrofit of jet engines to reduce noise

emissions is the most recent evidence of NBAA concern for the American quality of life. Our efforts will continue—our concern will not abate.

/s/ Lawrence P. Bedore
LAWRENCE P. BEDORE

Sworn to and subscribed before
me, a Notary Public in and
for the District of Columbia,
at the City of Washington,
in said District and City, this
29th day of April, 1971

/s/ Stanley H. Fiscler, Jr.

Notary Public in and for the District
of Columbia in the City of Washington

Exhibit 2



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OFFICE OF CITY ATTORNEY

CITY OF BURBANK

CALIFORNIA

November 21, 1972

SAMUEL GORLICK
CITY ATTORNEY

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Mr. William H. Roberge, Jr.
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1156 Fifteenth Street, N.W., Suite 516
Washington, D. C. 20005

Re: City of Burbank, et al. v.
Lockheed Air Terminal, Inc., et al.
Supreme Court Docket No. 71-1637

Dear Mr. Roberge:

This will serve to confirm that we have no objection to your filing a brief in behalf of National Business Aircraft Association, Inc., as amicus curiae, in support of the appellees in the above entitled action.

In response to your further request we are enclosing a copy of the Jurisdictional Statement which we filed. For anything further, we would suggest that you contact Appellees' counsel, Mr. Warren Christopher of the firm of O'Melveny & Myers, 611 West Sixth Street, Los Angeles, California 90017.

Yours very truly,

SAMUEL GORLICK
City Attorney

By *Richard L. Sieg, Jr.*
Richard L. Sieg, Jr.
Assistant City Attorney

RLS:mmm
Enc

Exhibit 3

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OUR FILE NUMBER

10,010-2

William H. Roberge, Jr., Esq.
Messrs. Powell & Becker
1156 Fifteenth Street, N.W.
Washington, D. C. 20005

Re City of Burbank, et al. v. Lockheed Air
Terminal, Inc., et al., Supreme Court of
the United States, October Term 1972,
No. 71-1637

Dear Mr. Roberge:

Thank you for your letter of October 7,
1972. On behalf of the appellees, we hereby consent
to your filing an amicus brief on behalf of your
client, National Business Aircraft Association.

Sincerely,

Warren Christopher
Warren Christopher

WC:gg

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1637

CITY OF BURBANK, ET AL., APPELLANTS

v.

LOCKHEED AIR TERMINAL, INC., ET AL.

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (A. 410) is reported at 457 F. 2d 667. The preliminary memorandum of the United States District Court for the Central District of California (A. 341) is reported at 318 F. Supp. 914. The final opinion of the district court (A. 375) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1972 (A. 5, 428). Notice of appeal was filed on May 15, 1972 (A. 5). This Court noted probable jurisdiction on October 10, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(2).

QUESTION PRESENTED

The United States will principally discuss the following question:

Whether a municipal ordinance prohibiting the take-off (except in emergencies) of pure jet aircraft between the hours of 11:00 P.M. and 7:00 A.M. at a privately owned airport located within the city's jurisdiction is unconstitutional under the Supremacy Clause because the ordinance seeks to regulate a field that has been preempted by the Federal Aviation Act of 1958, as amended, or because it is in conflict with a preferential runway order issued by the Federal Aviation Administration's airport control tower chief.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The relevant constitutional provisions, federal statutes, and local ordinance are set forth in Appendix A, *infra*, pp. 59-63.

INTEREST OF THE UNITED STATES

The issue in this case is whether the federal government has so occupied the field of air commerce as to preempt State or local governments from exercising their police power to impose a night curfew on the take-off of jet aircraft at privately owned airports within their jurisdiction. It is well established that a very large proportion of aviation activity is under the umbrella of federal preemption; once "a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls" as to which "[f]ederal control is intensive and exclusive." *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (Jack-

son, J., concurring). Whether this exclusive federal control extends to the determination whether an aircraft shall be permitted to initiate its journey, given the current state of federal legislation, congressional understanding, and federal administrative practice, importantly affects the division not only of power but of responsibility between federal and state governments. A determination that this problem involves an exclusively federal responsibility would, therefore, influence the approach of the federal government to the execution of such responsibilities.

The issue raised by this case is of concern to the United States not only from the standpoint of the regulation of air commerce, but also because of the active federal interest in noise problems. In the Noise Control Act of 1972, P.L. 92-574 (October 27, 1972), Congress has found (in Section 2) that "inadequately controlled noise presents a growing danger to the health and welfare of the Nation's population," and has declared that "it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare." Congress further found that "while primary responsibility for control of noise rests with State and local governments, Federal action is essential to deal with major noise sources in commerce control of which requires national uniformity of treatment."

One of the major areas of concern involves airplane noise. According to a study undertaken by the Environmental Protection Agency under the Noise Pollution and Abatement Act of 1970, P.L. 91-604, 84 Stat. 1709, it is conservatively estimated that approximately

7¼ million people in the United States live near airports within a noise contour where widespread complaint about noise can be expected. Report to the President and Congress on Noise, S. Doc. No. 92-63, 92d Cong., 2d Sess., pp. 2-79.

In *amicus curiae* filings in the courts below in this case, the Federal Aviation Administration supported the position of appellees herein that Burbank's ordinance is invalid under the Supremacy Clause, on the grounds that the subject has been preempted by the federal government and that the ordinance conflicts with federal regulation. Subsequently, however, a thorough review of the legislative history underlying the Federal Aviation Act of 1958 and subsequent enactments bearing on the issues has persuaded us that Congress did not intend to preclude local regulation of the sort here entailed, and that, on the contrary, Congress has consistently proceeded on the premise that State and local governments retain the power, in order to shield persons residing around airports from undesirable aircraft noise, to impose night curfews and restrictions on aircraft types that may utilize their airports (as long as there is not any impermissible burdening of interstate commerce). Our primary purpose in filing this brief is to discuss the legislative materials that have led us to this conclusion. The position set forth herein reflects the views of the Department of Transportation, of which the FAA is a constituent agency.

STATEMENT

Hollywood-Burbank Airport ("Hollywood-Burbank" or the "airport") is a privately owned and operated airport located in a thickly populated area. It is entirely within the City of Burbank, except for the northernmost 2,050-foot portion of its north-south runway, which lies in the City of Los Angeles (A. 24 Exh. A, 138-140, 373, 393). It is one of a number of satellite airports to Los Angeles International Airport (A. 238-241).

The airport is used by several commercial air carriers (A. 46, 206, 383) as well as by corporate jet aircraft (A. 149). Since 1965, when the first commercial jet aircraft were introduced at Hollywood-Burbank, the airport has experienced a rapid growth in passengers served, growing to an estimated 1,300,000 passengers in 1970 (A. 142, 148-149, 159). Ninety-seven percent of the 32,000 yearly air carrier operations at the airport are with pure jet aircraft (A. 148).

Increasingly in recent years, noise from jet operations at Hollywood-Burbank Airport has posed a serious problem to the surrounding communities (A. 316-319, 453-462). The area within a five-mile radius of the airport is considered to be noise sensitive (A. 454, 459-460). Beginning in 1967, the chief of the airport control tower, which the Federal Aviation Administration ("FAA") operates, issued a series of non-mandatory runway preference orders governing the assignment of runways for take-offs and landings at the

airport, in an effort to alleviate community complaints about noise (A. 112, 453-462). The last of these orders, issued September 4, 1969, was in effect at the time of adoption of Burbank's night curfew ordinance (A. 392-393, 413). Despite the controller's efforts, the assignment of one runway over another did not diminish complaints, but merely shifted or expanded their locale (A. 318-319, 453-462). The airport's runways in both directions produce flights over residential districts (A. 393, 411).

On March 31, 1970, the City Council of Burbank, in response to continuing complaints about noise from the airport, passed Ordinance No. 2216, which, effective May 4, 1970, prohibited the take-off of pure jet aircraft between 11:00 P.M. and 7:00 A.M., except in emergencies (A. 413). The express purpose of this ordinance was to gain surcease from the noise caused by the take-off of pure jet aircraft during sleeping hours (A. 413).

One regularly scheduled airline departure per week was affected by the ordinance—a flight of the intra-state carrier Pacific Southwest Airlines ("PSA"), which originated in Oakland and departed from Hollywood-Burbank for San Diego at 11:30 P.M. each Sunday night (A. 88, 95-96). The primary impact of the ordinance has been on the late night or early morning departures of business jets, which, prior to the effective date of the ordinance, had accounted for some 60 or more take-offs per month during the prescribed hours (A. 167-168, 327, 332-333, 521).

On May 14, 1970, Lockheed Air Terminal, Inc. (the owner and operator of the airport) and PSA,

later joined by the Air Transport Association of America, filed suit for declaratory and injunctive relief against the City of Burbank and certain of its public officials, claiming among other things that the ordinance violated the Supremacy Clause and the Commerce Clause of the Constitution (A. 1-2, 6-18, 27-35). After a three-day trial, the district court held the ordinance unconstitutional as violating both the Supremacy Clause and the Commerce Clause and permanently enjoined its enforcement (A. 4, 405, 408).

The court of appeals affirmed. In doing so, it did not address the question whether the ordinance imposed an undue burden on interstate commerce, resting its decision solely on Supremacy Clause grounds. The court ruled that "[t]he pervasiveness of federal regulation in the field of air commerce, the intensity of the national interest in this regulation, and the nature of air commerce itself require the conclusion that State and local regulation in that area has been preempted" (A. 417). While it recognized that local governments, when acting as airport proprietors, could "deny the use of [an] airport based on noise consideration," it held that this could not be done through the exercise of the police power (A. 423). The court further held that the Burbank ordinance conflicted with a federal regulation, the runway preference order (A. 426). One judge concurred in the result with respect to this latter point only (A. 427).

ARGUMENT**INTRODUCTION AND SUMMARY**

In reaching the conclusion that the night curfew ordinance of the City of Burbank violated the Supremacy Clause by seeking to regulate in a federally-preempted area, the court of appeals relied heavily on the comprehensiveness of the scheme of federal regulation of aviation activities. We agree that Congress, through the Federal Aviation Act, has created a comprehensive system of federal regulation. However, descending from broad generalities about the scope of federal regulation to a more precise analysis of the content of the Act and its underlying legislative history, it becomes apparent that the system of federal regulation is only preemptive in part, and that there are significant areas of concurrent or primary State and local jurisdiction.

Among the areas in which there appears to be a clear federal preemption of State regulation are the following: The regulation of routes, rates, and other economic facets of interstate, overseas, and foreign air carrier operations, which is committed to the jurisdiction of the Civil Aeronautics Board; air traffic control, airspace management, licensing of airmen, certification of aircraft and engines (including noise emission standards), all committed to exclusive federal regulation through the Federal Aviation Administration (FAA).

On the other hand, matters such as the location and size of airports, land use planning around airports, and management of the airports are primarily

left to State and local decision, subject to a degree of federal supervision through such means as conditions in agreements for federal airport funding. As a practical matter, many facets of airport utilization, including control of aircraft noise on and around airports, are subject to concurrent federal and State/local jurisdiction. Federal control is exercised primarily through airspace and air traffic regulation, and State/local control by limiting access to the airport itself or particular facilities thereon.¹¹

The imposition of night airport curfews is not a matter that necessarily requires uniform national treatment, since the decision with respect to the different airports around the country will be influenced in part by factors that are variable from airport to airport, such as the land use in the vicinity of the airport and the nature of the air service requirements of the community in which it is located. While the interests affected by the decision whether or not to impose a curfew are not purely local (flights that use the Burbank airport are presumably en route to or from some other city), the balancing of the local community's desire for a tranquil environment and its needs for a flourishing air commerce is surely an im-

¹¹ To illustrate, the FAA would decide whether the runways are adequate to permit safe operation by aircraft of certain operating characteristics or whether the instrumentation is sufficient to permit operations under certain weather conditions. The local government, ordinarily through its role as airport proprietor, could close a particular runway, impose curfews, or otherwise restrict access to and use of the airport or some of its facilities. The local governmental airport proprietor might bargain away some of these rights through covenants in federal grant agreements.

portant ingredient in the equation, and it would not be irrational for Congress to leave the determination in the hands of State and local authorities except where its resolution by them transgresses some overriding federal interest.

The question of preemption ultimately turns upon the intent of Congress. This congressional intent is sometimes expressed in the enactment itself, sometimes demonstrable from the legislative history, and often left to be inferred by the courts from the structure of the legislative scheme and the nature of the subject matter. In the present case, we are dealing with a fairly comprehensive federal regulatory scheme in which broad, albeit partially unexercised, power to regulate aircraft noise has been conferred upon the Administrator of FAA. However, a review of the legislative history underlying the enactment of the Federal Aviation Act of 1958 and subsequent amendments thereto, as well as the Noise Control Act of 1972, reveals that Congress did not entertain any preemptive intent; rather, it legislated on the assumption that the States would retain concurrent jurisdiction to effectuate noise abatement measures, particularly by means of their control over access to and use of airports. Any finding of preemption is thus precluded by this congressional understanding and intent.

The court of appeals' further finding that the Burbank ordinance is invalid under the Supremacy Clause by virtue of a supposed conflict with the FAA tower chief's preferential runway order is also in error. That order was a limited federal action for noise

abatement objectives, utilizing the FAA's traditional air traffic control powers. It was not, however, a manifestation of a deliberately arrived at federal policy against further noise abatement measures at Burbank. Burbank's ordinance was in fundamental harmony with the purposes of the preferential runway order and also with the national noise policy as recently declared by Congress in the Noise Control Act of 1972. It does not prohibit any activity that is required by federal laws and regulations; there simply is no general federal policy in favor of night flights by jet aircraft over densely populated residential districts irrespective of environmental consequences, nor is there any such specific policy applicable to Burbank. Accordingly, the ordinance does not conflict with governing federal laws or regulations.

The ordinance was also attacked as imposing an undue burden on interstate commerce, a claim that was upheld by the district court and not addressed by the court of appeals. The district court's finding was predicated upon a consideration of the effect of nationwide imposition of curfews, rather than on the particularized effect of Burbank's curfew on commerce. We believe that, in light of the congressional understanding that State and local governments retain some concurrent power to deal with aircraft noise problems through their control over airports, such a blanket approach to the evaluation of the effect of Burbank's curfew was unwarranted. As to the particular effect of the Burbank ordinance, the record does not adequately explore this issue, and the plaintiffs have failed to meet their burden of proof.

I

CONGRESS DID NOT INTEND TO PREEMPT LOCAL REGULATION
OF AIRCRAFT NOISE BY MEANS OF NIGHT CURFEW ORDINANCES
APPLICABLE TO AIRPORTS WITHIN THE JURISDICTION OF LOCAL GOVERNMENTS

A. GENERAL PRINCIPLES OF PREEMPTION

The primary question to which we address ourselves in this brief is whether the area of *exclusive* federal regulation of air commerce encompasses the imposition of restrictions on the use of airports by certain types of aircraft or at certain times of the day. That there is a very substantial segment of air commerce, including all aspects of airspace management, flight navigation, and safety, from which the States are excluded from the exercise of any regulatory power by federal preemption is scarcely subject to dispute. See *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (Jackson, J., concurring). Nor can it be doubted, given the intimate relationship between the operation of aircraft and interstate commerce, that Congress could assume exclusive dominion over various facets of airport regulation, including the subject of operational curfews, if it considered it necessary or desirable to bring such matters within the ambit of centralized federal regulation. The issue in this case, however, is not whether the power to exclude State and local regulation exists, but whether it has in fact been exercised.

In determining the application of the doctrine of federal preemption, "[t]he question in each case is what the purpose of Congress was." *Rice v. Santa Fe*

Elevator Corp., 331 U.S. 218, 230. Where, as here, the State or local regulation involves the exercise of traditional police powers, the starting place of the inquiry is the assumption that such powers "were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ibid.*; see also *Head v. New Mexico Board*, 374 U.S. 424, 430-431; *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142, 146.

Sometimes congressional legislation will explicitly exclude concurrent State or local regulation of a particular subject,² while at other times Congress may expressly consent to supplemental, duplicating, or even inconsistent State regulation.³ More commonly, however, federal statutes do not contain express directives regarding the question, leaving the courts to infer from the nature of the congressional enactment, the character of the subject matter with which it is concerned, and the scope of federal regulatory activity in the field whether preemption is an intended or inherently necessary consequence of the federal legislation. See, e.g., *Rice v. Santa Fe Elevator Corp.*, *supra*; *Cloverleaf Co. v. Patterson*, 315 U.S. 148; *Hines v. Davidowitz*, 312 U.S. 52; *San Diego Building Trades Council v. Garmon*, 359 U.S. 236; *Campbell v. Hussey*,

² E.g., United States Warehouse Act, Section 29, 39 Stat. 490, as amended, 7 U.S.C. 269; Railway Labor Act, Section 2, 44 Stat. 577, as amended, 45 U.S.C. 152.

³ E.g., Fair Labor Standards Act, Section 18, 52 Stat. 1069, as amended, 29 U.S.C. 218; Labor-Management Reporting and Disclosure Act of 1959, Sections 603(a), 604, 73 Stat. 540, 29 U.S.C. 523(a), 524; Securities Act of 1933, Section 18, 48 Stat. 85, 15 U.S.C. 77r.

368 U.S. 297. See also Bikle, *The Silence of Congress*, 41 Harv. L. Rev. 200 (1927).

The history of congressional legislation touching upon airport/aircraft noise problems reflects a congressional understanding and intention that certain aspects of regulation, including curfews restricting airport use, remain appropriate subjects of State and local regulation. Given this congressional understanding, we believe that the underlying principles of the preemption doctrine compel the conclusion that the Burbank ordinance here at issue does not trespass upon a federally preempted area of regulation.

This is not to say that Congress is unconcerned with aircraft noise problems. As will appear from the ensuing discussion, action has been taken on several fronts by Congress and by the FAA, including the adoption of flight rules designed to accomplish noise abatement and the exercise of control over the design and manufacture of aircraft. Moreover, the entire subject of federal policy on aircraft noise, which ultimately necessitates a balancing of competing considerations of the encouragement of commerce and the maintenance of a healthful environment, is presently under intensive study pursuant to the congressional directive contained in the Noise Control Act of 1972, *supra*. We do not believe, however, that the objectives of Burbank's ordinance are inconsistent with the basic thrust of federal policy, or that the various federal initiatives so far undertaken reflect a policy of excluding local airport curfews at this time.

THE HISTORY OF CONGRESSIONAL LEGISLATION TOUCHING THE SUBJECT REVEALS AN UNDERSTANDING AND INTENT THAT STATE AND LOCAL GOVERNMENTS RETAIN POWER TO REGULATE THE USE OF AIRPORTS WITHIN THEIR JURISDICTION BY SUCH MEANS AS NIGHT CURFEWS

1. The early background

The federal government's regulation of air commerce, while marked by steady expansion, has also been marked by concern for the interests and jurisdiction of the States. In discussing the bill which became the Air Commerce Act of 1926, the first congressional legislative venture in the regulation of air commerce, the Senate Commerce Committee stated: *

While the bill gives to the Secretary of Commerce authority to regulate and control civil aircraft engaged in interstate commerce and flying over Government property, care has been taken to avoid constitutional entanglements, and intrastate flying is left to the control of the States. It is hoped that the States will adopt uniform laws and regulations corresponding with the provisions of this bill and the rules and regulations that will be promulgated under it if it becomes a law.

The primary motivation for the 1926 Act was the need to improve aviation safety.¹ The means chosen was the regulation of aircraft and airmen and the development of civil airways; however, no claim was made for exclusive Federal jurisdiction. The role left to the States under the 1926 Act is evident from the

*S. Rep. No. 2, 69th Cong., 1st Sess., p. 8.

¹*Id.* at pp. 2-4.

following comment on the Uniform Licensing Act of 1930, which dealt with State licensing of aircraft and airmen and the issuance of State air traffic rules:⁶

* * * [T]he act recognized the policy, principles and practices established by the federal Air Commerce Act of 1926. Furthermore it provided for the acceptance of a federal airman's license if offered in lieu of a state license, and directed that issuance of state licenses for aircraft and airmen should coincide as far as practicable with the federal laws. In addition the act exempted from its terms, civil aircraft or airmen engaged exclusively in commercial flying constituting an act of interstate or foreign commerce. [Footnote omitted.]

The growth of aviation in the ensuing decade created strong economic pressures for more comprehensive federal regulation,⁷ and Congress responded with the Civil Aeronautics Act of 1938.⁸ That Act further narrowed the area of permissible State action. The effect has been described as follows:⁹

The Civil Aeronautics Act of 1938 wrought a material shifting in the areas of federal and state authority. The Act established the dominance of federal power in the matter of air safety, particularly in the matter of air traffic rules, airworthiness of aircraft, competence of airmen, and the certification of both aircraft and airmen. The Act asserted federal control

⁶ Plaine, *State Aviation Legislation*, 14 J. Air L. and Comm. 334 (1947).

⁷ S. Rep. No. 1661, 75th Cong., 3d Sess., p. 2.

⁸ Act of June 23, 1938, 52 Stat. 973.

⁹ Plaine, *supra* note 6, at 335.

over the economic regulation of transportation by common carriers by aircraft, granting to the federal aeronautical agencies the important functions of certification of routes and of rate making. As so often happens in the accomplishment of great changes, there were left shaded areas of doubt, where exclusivity of respective jurisdictions was not clear and where dual or joint governmental activity remained a possibility.

In the air safety field, court decisions have supported the construction of the Act which in effect requires federal certification of all aircraft and airmen. In the economic regulatory field, instances of purely intrastate air transportation by scheduled carriers had been and continued to be so negligible as to leave very little of substance upon which state regulation might operate without duplicating federal action. As subjects for fairly full state action, the airport, contract, tort, criminal and tax jurisdictions were generally left undisturbed. [Footnotes omitted.]

The "undisturbed" area of airports was the next object of congressional attention. Significantly, in terms of the balance of federal and State jurisdiction, Congress approached the subject of airports with a carrot rather than a stick. With the Federal Airport Act of 1946,¹⁰ Congress authorized a multi-million dollar assistance program to encourage State

¹⁰ Act of May 13, 1946, 60 Stat. 170. During the 1930s and early 1940s the federal government had engaged in airport development through a variety of public works relief programs and as part of the national defense effort. However, the 1946 Act was the first systematic federal approach to airports.

and municipal development of airports on a matching-grant basis. The object of the program was "to bring about, in conformity with the national airport plan * * * the establishment of a Nation-wide system of public airports adequate to meet the present and future needs of civil aeronautics * * *." ¹¹ The only condition relating to the grantee's right to control the use of its airport was a requirement that "the airport * * * be available for public use on fair and reasonable terms and without unjust discrimination." ¹²

In the meanwhile, at least one local governmental entity was exercising its airport jurisdiction for noise abatement objectives. In 1951, when commercial jets were still in the design stage, the Port of New York Authority adopted a regulation that "[n]o jet or turboprop aircraft may land or take off at an air terminal without permission [of the Port Authority]." Hearings before Subcommittees of the House Committee on Interstate and Foreign Commerce on Aircraft Noise Problems, 86th and 87th Congs., p. 5 (hereafter referred to as "House Hearings on Aircraft Noise Problems"). The Port Authority's regulation was adopted in view of the noise history of military

¹¹ Sec. 4, 60 Stat. 171-172.

¹² Sec. 11(1), 60 Stat. 176. In recognition of the increasing seriousness of the aircraft noise problem, Congress in 1964 added another condition to the Act, requiring assurance from the sponsor that "appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations including landing and take-off of aircraft" (Act of March 11, 1964, P. L. 88-280, Sec. 10(1), 75 Stat. 161).

jets and was intended to spur commercial jet designers to improve the noise characteristics of their aircraft. Pursuant to its regulation, the Port Authority denied landing privileges to unsuppressed prototypes of commercial jets manufactured by De Havilland Aircraft Company and by Boeing (*id.* at 5-6).

2. *The Federal Aviation Act of 1958*

Thus, from the beginning of federal regulation of aviation in 1926 until 1958, there was no federal legislation touching upon the subject of aircraft noise or establishing any basis for recognizing a federal preemption of the field. The Federal Aviation Act of 1958 effected virtually no change in jurisdiction; neither aircraft noise problems nor the balance of federal-State jurisdiction was considered by Congress.¹² Rather, the entire thrust of the 1958 Act was the consolidation and centralization *within the federal establishment* of the responsibility for air-space management, air traffic control, and air navigation systems.

In 1958, Congress' focus was on assuring safety in the chaotic airspace where, in the last year, there had been 971 near collisions reported to the Civil Aeronautics Board and two tragic mid-air collisions between military and civilian planes within a month.

¹² The sole exception was the Act's elimination of the last vestige of State control of airspace left intact after the 1938 Act. Section 4 of the Air Commerce Act of 1926, which had permitted States to establish non-conflicting airspace reservations to protect State lands, was repealed. 72 Stat. 806. While this action completed the federal preemption of airspace regulation, it had no impact on the subject of State jurisdiction to regulate airports.

Hearings before the Subcommittee on Aviation of the Senate Committee on Interstate and Foreign Commerce, on S. 3880, Federal Aviation Agency Act, 85th Cong., 2d Sess., pp. 40, 51, 65-66, 71-72, 79, 196, 302-308 (hereafter "Senate Hearings on the 1958 Act"). Federal control of that airspace, though pervasive as against State and local authorities, was itself fragmented and diffuse. It was not lack of federal power, but lack of cohesion in the use of that power on the federal level, that posed a threat to the safe use of airspace as to which the federal government had already asserted its "exclusive national sovereignty." 49 U.S.C. 1508(a); S. Rep. No. 1811, 85th Cong., 2d Sess., pp. 5-6.

The efficient use and management of that airspace was also a major congressional concern. The roar of jet aircraft was a distant sound to the 1958 Congress,¹⁴ but the swiftness of the jet, whose commercial operation was imminent, was very much a matter of congressional concern. Senate Hearings on the 1958 Act, pp. 39, 70, 109, 145-148, 156, 160. As the speed and number of aircraft demanding entry into the airspace increased, so to that extent did the available airspace

¹⁴ Although the military had been flying jets for some 10 years, with minor exception their use of jet aircraft had not caused a serious noise problem to persons on the ground. The general separation of military bases from heavily residential areas, and the priority of purely military considerations and specifications in the design of military aircraft, had by and large meant that noise abatement considerations were not prominently associated with these early jet aircraft operations. Cf. *United States v. Causby*, 328 U.S. 256; House Hearings on Aircraft Noise Problems, pp. 4-5.

diminish. The airspace was a scare resource. It was, in Senator Monroney's words, an "airspace inviolate," and all those who trespassed there, all those who would seek "to invade that airspace," could do so only with federal permission. Senate Hearings on the 1958 Act, *supra*, p. 369.

These twin concerns of air safety and airspace management prompted enactment of the Federal Aviation Act of 1958. S. Rep. No. 1811, *supra*, pp. 5-6, 13-15. Congress established the Federal Aviation Agency, a single federal regulator (49 U.S.C. 1341), to stand at the portals of the airspace and to guide and direct all those who demanded admission. The comprehensive system of regulation embraced the men who sought to fly in the airspace (49 U.S.C. 1422; 14 C.F.R. Part 61); the type of craft they operated (49 U.S.C. 1423; 14 C.F.R. Parts 21-39); the path they sought to fly (49 U.S.C. 1348(c); 14 C.F.R. Part 91); and their allotted segment of the sky (49 U.S.C. 1348(a); 14 C.F.R. Part 71).

But Senator Monroney, author of the 1958 Act, was of the definite view that the scope of exclusive federal regulation was to be limited and did not include control of the ground, as illustrated by the following colloquy with one of the government's witnesses at the Senate hearings:¹⁸

Mr. MACINTYRE. As a practical matter we can't stop the Port of New York Authority * * * if it chooses to use its own money and change its airport layout.

¹⁸ Senate Hearings on the 1958 Act, *supra*, p. 279.

Senator MONBONEY. The Administrator of the Federal Aviation Agency can deny the entrance of flights from that airport into the airways system. He can prohibit that air traffic. They might build the field but they sure couldn't use it. That would not obtain on the military side.

Mr. MACINTYRE. I am not sure that you can deny the airspace to anybody unless you wrote it in the bill.

Senator MONBONEY. This gives the Administrator control over the airspace, therefore he has the right to do just that. *We don't have control over the ground space.* Persons can build anywhere they wish. As I read the act, I think they could still build ground facilities but they wouldn't necessarily be able to get a plane off of it into the air.

Mr. MACINTYRE. I doubt that you have the right of denial of access. That would involve some very nice litigation if you construed this as meaning—

Senator MONBONEY. *Certainly that is the intent of the act, and while we didn't assume to control the ground, we would control the airspace.* [Emphasis supplied.]

The 1958 Act did empower the Administrator of FAA to issue air traffic rules for the "protection of persons and property on the ground" (49 U.S.C. 1943 (c)), and this clause provided the first legislative footing for federal regulation of aircraft noise. However, the adoption of this provision was wholly unrelated to any congressional consideration of aircraft noise problems. Rather, it was offered to provide authority to protect persons and property on the ground from in-

pesticides sprayed from the air" and was also viewed as providing authority to establish minimum altitudes for aircraft in flight." It affords no basis for finding any congressional intent to preempt State and local aircraft noise abatement actions.

In summary, prior to 1926 the States possessed complete authority to regulate civil (non-federal) aircraft within their borders and the overlying airspace. During the period from 1926 to 1958, Congress gradually asserted federal jurisdiction, although not exclusively in all cases, over the certification of airmen, aircraft, air carriers, airspace and air traffic control. It did not assume any active jurisdiction over airports or the activities thereon." When Congress did decide to enter an area of State jurisdiction, it did so explicitly. The regula-

"Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, on H.R. 12616, Federal Aviation Act, 85th Cong., 2d Sess., pp. 267-269.

"Senate Hearings on the 1958 Act, *supra*, pp. 246-249.

"Section 606 of the 1938 Act (52 Stat. 1011) did authorize the Administrator to "inspect, classify, and rate any air navigation facility available for the use of civil aircraft." The term "air navigation facility" was defined to include, among other things, "landing areas" (Sec. 1(7), 52 Stat. 977). Since the word "airport" was defined to mean a "landing area" (Sec. 1(8)), Section 606 of the Act gave the Administrator authority to inspect, classify, and rate airports as to their suitability for use by civil aircraft. Identical provisions were incorporated in the Federal Aviation Act of 1958 (Secs. 606 (49 U.S.C. 1426), 101(8) (49 U.S.C. 1301(8)) and 101(9) (49 U.S.C. 1301(9))), respectively). This potential authority was never exercised, and there is no evidence that its enactment reflected any preemptive intent on the part of Congress. In 1970, Congress amended the Act to authorize the Administrator to issue airport operating certificates to airports serving air carriers certificated by the CAB and to issue minimum safety standards for the operation of such airports. 49 U.S.C. 1432. See note 29, *infra*, p. 37.

tion of aircraft noise or the effects of aircraft noise around airports was not the subject of any congressional enactment prior to 1968." Aircraft noise was considered a problem of the ground, not of the air, and if it was dealt with at all by government, it was only through the medium of State and local land use and airport control.

In *Griggs v. Allegheny County*, 369 U.S. 84, this Court's holding that the local government operating the airport rather than the United States would be liable for noise flowed from its understanding of the historical roles of the federal and State governments in our national air transportation system. In finding that it was the airport operator who "decided, subject to the approval of the C.A.A., where the airport would be built, what runways it would need, their direction and length, and what land and navigational easements would be needed" (*id.* at 89), this Court recognized that it was the States and their agencies who were the builders and regulators of airports, and that the federal government had chosen to limit its role to facilitating local airport development through a financial assistance program.

3. *Hearings on aircraft noise problems, 1959-1962*

Within a year of the first commercial jet passenger flight, the House Committee on Interstate and Foreign Commerce instituted hearings on aircraft noise problems. Extending over three years, those hearings demonstrate that the Federal Aviation Act of 1958

¹⁹ The 1968 aircraft noise legislation is discussed at pp. 30-37, *infra*.

and prior federal law was not understood to have divested the States and their instrumentalities of authority to impose night curfews on jet take-offs for noise abatement purposes. Throughout the hearings all concerned, including the FAA, interpreted the 1958 Act as leaving local noise abatement authority intact, insofar as such authority was predicated on control of access to and use of airport facilities. While the 1958 Act had conferred power on the FAA to take noise abatement action through the issuance of air traffic rules for the "protection of persons and property on the ground" (49 U.S.C. 1348(c)), such authority was considered non-exclusive.

The hearings opened with a recounting by the Port of New York Authority of its early adoption, in 1951, of a rule requiring its permission for the take-off or landing of jet aircraft at New York's International Airport (see pp. 18-19, *supra*). The Port Authority witness next described the terms upon which it was then permitting such operations (House Hearings on Aircraft Noise Problems, *supra*, pp. 7-8):

The conditions under which the port authority permits these jets to operate at New York International Airport include a mandatory runway use procedure that requires that jet aircraft use runway 25 or runway 22, for over-water takeoffs whenever wind and weather conditions permit. When it is not possible to take off over water, then and only then, takeoffs are permitted on runway 13-R, 31-L, or 7, but only on the condition that they be so planned and conducted that their noise level will not exceed 112 perceived noise decibels. In ad-

dition, takeoffs involving flight over the communities are limited to the hours between 7 a.m. and 10 p.m. Takeoffs at night are permitted only over water on runways 22 and 25.

Representatives of the FAA testified regarding the actions and the authority of the agency in dealing with aircraft noise problems. The Committee was advised that the agency had taken action to minimize problems arising from jet aircraft noise through the assignment of preferential noise abatement runways and the alteration of flight patterns and altitudes (*id.* at 64-73, 124, 408). Though actions of this nature constituted "the most effective noise abatement program now available to us" (*id.* at 124), there was still an area of action for the States and their instrumentalities. As FAA's Deputy General Counsel explained (*id.* at 670, 699):

Generally, the line of demarcation is that the Federal Government has control of the navigable airspace and regulates it. The community that owns the airport regulates it. It controls traffic on the ground.³⁰

The Federal Government cannot compel a city to have an airport if it doesn't want one. If a city decides it wants to shut down its airport all night the city has the right to do that.

What the Federal Government does is regulate the planes in the air. There is a provision in the Federal Aviation Act that says that the

³⁰ Strictly speaking, FAA asserts jurisdiction for air traffic control purposes over traffic "operating in the air or on an airport surface, exclusive of loading ramps and parking areas" (14 C.F.R. 1.1), which is somewhat broader than described by the witness.

Agency can enact air traffic rules for a number of purposes, one of which is for the protection of persons and property on the ground.

It is that section that our noise abatement departure regulations are based on. When a plane is in the air, our controller will tell it what turns to make to avoid heavily built-up areas, but *whether jets land at all or not at an airport or whether they take off at night or not is up to the municipality.* [Emphasis supplied.]

* * * * *

Now, on the subject whether we could refuse to permit aircraft departures or arrivals at certain hours, yes, I suppose we could. We could refuse to permit them to use the navigable airspace to approach or depart at certain hours. But as I said this morning, we do not, and we do not think we should, because we think it is a local problem—whether it wants to use its airport at night or not.

That line of demarcation was adhered to by the FAA throughout the hearings (*id.* at 376-377, 408-409, 426-429, 670-671).

At the conclusion of its hearings, the Committee reported the results of its investigation and study. H. Rep. No. 36, 88th Cong., 1st Sess. The Committee noted (*id.* at 2-3):

[N]oise from airplane engines is a more or less severe annoyance to millions of our people * * *

* * * * *

* * * The complaints included interruption of conversations, church services, and school classes. Night time flights were held to interfere

with sleep. And an important source of complaint stems from fear; fear that a low-flying plane may be about to crash into one's house.

The Committee reviewed the action taken by FAA to abate noise—extensive research into improved aircraft design, engine design, and noise suppression devices; establishment of preferential runways; alteration of flight patterns and altitudes; and earlier power reductions on climbout (*id.* at 12-16, 20-22). The Committee found what appeared to be a “consensus that whatever aircraft noise relief is obtainable through air traffic rules changes * * * has been pretty much exhausted. While further changes here or there might bring some minor relief to a few people, this possibility can no longer be viewed as a major aircraft noise abatement tool” (*id.* at 22).

It was the Committee's view that State and local governments, either in the exercise of their police power or in their proprietary capacity as owners and operators of airports, possessed noise abatement powers which could be exercised through such devices as antinoise ordinances, zoning of areas surrounding airports, and imposition of restrictions as to the use of the airport facilities (*id.* at 22-23). The Committee specifically found (*id.* at 27):

7.01: The FAA has authority to promulgate air traffic rules and regulations governing the operation of aircraft in flight so as to minimize noise and other hazards to persons and property on the ground.

7.02: Interstate and international air commerce is considered to be in the sole domain of the Federal Government. The Federal Govern-

ment, however, has not exercised its authority in conjunction with any enactment which would attempt to establish an aircraft noise criterion.

7.03: Until Federal action is taken, the local governmental authorities must be deemed to possess the police power necessary to protect their citizens and property from the unreasonable invasion of aircraft noise. The wisdom of exercising such power or the manner of the exercise is a problem to be resolved on the local governmental level.

7.04: There is no evidence of any effort by any State or municipality to exercise local governmental authority to control the impact of aircraft noise upon the community.

7.05: Airports in the United States, as a general rule, are operated by a local governmental authority, either a municipality, a county, or some independent unit. These airport operators are closer, both geographically and politically, to the problem of the conflict of interests between those citizens who have been adversely affected by the aircraft noise and the needs of the community for air commerce. Some airport operators have exercised the proprietary right to restrict in a reasonable manner, the use of any runway by limiting either the hours during which it may be used or the types of civil transport aircraft that may use it.

7.06: The Federal Aviation Agency has and has exercised the authority to establish a preferential runway system for any airport.

7.07: The local governmental authorities appear to be reluctant to exercise their governmental prerogatives other than police power, to partially relieve its citizens who are anguished by aircraft noise.

The Committee's report concluded by recommending a series of measures by the Federal Government, including research into noise suppression engine design, consideration by the FAA of conditioning the grant of federal airport development funds on the local airport owner's procurement of sufficient avigational easements, ^{and} FAA development of a valid measurement of aircraft noise annoyance. With respect to non-federal action, the Committee recommended the exercise of state and local police powers to alleviate the impact of aircraft noise from airports in the community and, "where it is essential to the peace of an adjacent community," the exploration by airport operators, in consultation with FAA, of possible restrictions "on the use of runways with regard to either hours of the day or types of aircraft" (*id.* at 27-28).

The Committee's findings and conclusions are wholly incompatible with the notion that the 1958 Act (or prior federal aviation legislation) had been intended to foreclose State and local authorities from noise abatement measures through control of airports under their jurisdiction.

4. The 1968 noise abatement amendment

In 1968, Congress enacted Section 611 of the Federal Aviation Act, 49 U.S.C. 1431, the first provision of the Act expressly addressed to noise problems. This legislation directed the Administrator of FAA to develop standards for the measurement of aircraft noise and sonic boom and to "prescribe and amend such rules and regulations as he may find necessary for the control and abatement" thereof. While this

legislation strengthened the mandate and authority of federal regulators to move against aircraft noise problems, a review of the underlying legislative history manifests a congressional intent to leave pre-existing State and local powers unimpaired unless they are exercised in a manner that conflicts with the affirmative exercise of federal power under the provision.

The burgeoning growth of aviation and the widespread introduction of jet aircraft into commercial and corporate fleets during the years since the passage of the 1958 Act had greatly exacerbated the problem of aircraft noise. S. Rep. No. 1353, 90th Cong., 2d Sess., pp. 1-2. At the same time, technological advances appeared to offer opportunities to make aircraft significantly less noisy. Hearings before the Aviation Subcommittee of the Senate Committee on Commerce on S. 707 and H.R. 3400, Aircraft Noise Abatement Regulation, 90th Cong., 2d Sess., pp. 6-8, 66-68, 82-86. This combination of circumstances led to the adoption of Section 611, the thrust of which was directed to accomplishing the full application of noise reduction technology to aircraft design. S. Rep. No. 1353, *supra*, p. 2.

When the aircraft noise legislation was being studied by the House Committee, the Air Transport Association submitted a proposed alternative to the bill as introduced. Among the changes suggested was one that would make the promulgation of noise standards by the FAA Administrator mandatory. The stated purpose of this suggestion was "to strengthen the role of the Federal Government in preempting

the field of aircraft noise regulation."²¹ In a letter to the Committee sent March 1, 1968, commenting on the ATA bill, the Department of Transportation expressed its view as to the role of the local community and the airport operator in noise regulation:²²

* * * Local communities should, if not inconsistent with overriding national interests, have the option to determine the effects of transportation on their environment. We do not believe that the mere presence of authority in the Federal Government to certify for noise purposes, or the exercise of that authority, should foreclose an airport operator from exercising his judgment or responding to the desires of the community with respect to aircraft noise. An action by an airport proprietor to exclude aircraft which exceed noise levels established by him does not conflict with the Federal authority to regulate air traffic.

The exercise of this and other authority by local communities should continue. Local communities select airport sites and determine where they best will serve community needs. They bear the responsibility for insuring compatible land use in the airport environs. They have the necessary promotional, proprietary, planning and land use authorities to carry out this responsibility. They have a very influential

²¹ Hearings before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce on H.R. 3400 and H.R. 14146, Aircraft Noise Abatement, 90th Cong., 1st and 2d Sess., p. 100.

²² This letter was not reprinted in the published hearings or the Committee report. The full text of the letter is set forth in Appendix B, *infra*.

voice in determining the type of service they want through their appearances in route proceedings before the CAB. In short, given the limits imposed by aeronautical technology, the community can and should continue to bear a heavy share of the responsibility for assuring the compatibility of the air service they seek and enjoy with the environmental objectives of the community.

While the bill as reported out (and as adopted) did utilize the mandatory word "shall" with reference to the promulgation of standards and the adoption of rules, the Committee's explanation of this language neither indicates nor suggests that this directive to the Administrator was intended to preempt State and local regulation (H. Rep. No. 1463, 90th Cong., 2d Sess., p. 5):

As noted above, the introduced bill merely authorized the establishment of standards, rules, and regulations and their application in the certification process. The bill reported by the committee requires their establishment and application. The basic purpose of this legislation is the control and abatement of aircraft noise and sonic boom. The committee would emphasize that this legislation should not be construed as permissive. Its intent is the reduction of unnecessary aircraft noise and sonic boom. All such noise might well be deemed unwanted. The committee believes that, as a matter of public policy, the goal must be the lowest possible level of disturbance consonant with safety and the public interest. *The committee would not have anyone construe this legislation as a license to*

permit noise or sonic boom. Rather, the application of standards, rules and regulations will establish ceilings beyond which noise and sonic boom will not be tolerated. [Emphasis supplied.]

Moreover, the report makes it quite clear that this legislation, although it conferred broad noise control powers on the Administrator, was focused upon the problem of noise in the context of aircraft design and manufacture (*id.* at 4):²²

The noise problem is basically a conflict between two groups or interests. On the one hand, there is a group who provide various air transportation services. On the other hand there is a group who live, work, and go to schools and churches in communities near airports. The latter group is frequently burdened to the point where they can neither enjoy nor reasonably use their land because of noise resulting from aircraft operations. Many of them derive no direct benefit from the aircraft operations which create the unwanted noise. Therefore it is easy to understand why they complain, and complain most vehemently. The possible solutions to this demanding and vexing problem which appear to offer the most promise are (1) new or modified engine and airframe designs, (2) special flight operating techniques and procedures, and (3) planning for land use in areas adjacent to airports so that such land use will be most compatible with aircraft operations. *This legislation is directed toward the primary problem: namely, reduction of noise at its source. [Emphasis supplied.]*

²² See also S. Rep. No. 1353, *supra*, pp. 2-3.

The question of State and local control over aircraft noise through control over airports was considered at the Senate hearings on this legislation. After discussion of the night curfew at Washington's National Airport, the following colloquy occurred between Senator Pearson and Secretary of Transportation Boyd:²³

Senator PEARSON. Just so I understand you, you hope to set standards of measurement of sound, and then you hope to provide for regulations as to sound *per aircraft*?

Secretary BOYD. That is right.

Senator PEARSON. And have those uniform?

Secretary BOYD. That is right.

Senator PEARSON. And then *whatever the local airports have as a restriction, that is something else again.*

Secretary BOYD. Yes sir. [Emphasis supplied.]

Shortly thereafter, Senator Monroney (author of the 1958 Act) asked Secretary Boyd whether the proposed legislation would "to any degree preempt State and local government regulation of aircraft noise and sonic boom?" The Secretary replied: "I would think that any [State or local] authority would be related to the airport itself, Mr. Chairman, but we would like to submit a written opinion on that."²⁴ The Department's opinion was submitted in a letter dated June 22, 1968,²⁵ discussed below.

²³ Senate Hearings on S. 707 and H.R. 3400, *supra*, p. 25.

²⁴ *Id.* at 29.

²⁵ *Id.* at 61.

The Senate Committee reported the House version of the bill without amendment. In a section of its report dealing with the relationship of the bill to local government initiatives, the Committee stated:"

* * * In this connection, the question is raised whether this bill adds or subtracts anything from the powers of State or local governments. It is not the intent of the Committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local government.

In this regard, we concur in the following views set forth by the Secretary in his letter to the Committee of June 22, 1968 * * *.

The Committee then quoted at length from the Secretary's letter, which expressed the view that, while regulation of the flight of aircraft with respect to noise was preempted, "the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport." S. Rep. No. 1353, *supra*, p. 6."

²⁶ S. Rep. No. 1353, 90th Cong., 2d Sess., p. 6.

²⁷ The Department's letters to the House and Senate Committees spoke in terms of the powers of local agencies acting as airport "proprietors," and the court of appeals relied upon this as a basis for distinguishing and holding preempted airport control undertaken through exercise of the police power. For reasons discussed more fully at pp. 44-49, *infra*, we do not believe this to be a valid distinction. Hollywood-Burbank Airport is to our knowledge the only privately owned airport in the country used by airlines operating jet aircraft, and the Department's attention was not focused upon the problems of local regulation of privately owned airports.

Thus, while the legislation conferred broad authority on the FAA to regulate aircraft noise, its primary focus was upon the accomplishment of this objective through controls directed at the source—aircraft and engine design. The legislation was not designed nor understood by Congress to oust the States from concurrent jurisdiction to deal with the problem in their traditional sphere of airport control.²⁸ While, under Section 611, the FAA could issue rules and regulations for the control and abatement of aircraft noise at airports, until it does so, the States are free to act.²⁹

²⁸ The regulations issued by FAA pursuant to its new noise control responsibilities reflect administrative ratification of this view. 14 C.F.R. 36.5 provides:

* * * the noise levels in this part have been determined to be as low as is economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply. No determination is made, under this part, that these noise levels are or should be acceptable or unacceptable for operation at, into, or out of, any airport.

In the preamble to the regulation, FAA stated (34 Fed. Reg. 18355, November 18, 1969):

* * * Compliance with Part 36 is not to be construed as a Federal determination that the aircraft is "acceptable," from a noise standpoint, in particular airport environments. Responsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport. The noise limits specified in Part 36 are the technologically practicable and economically reasonable limits of aircraft noise reduction technology at the time of type certification and are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce.

²⁹ The enactment in 1970 of Section 612 of the Federal Aviation Act, providing for the issuance of airport operating

5. *The Noise Control Act of 1972*

On October 27, 1972, the President signed into law the Noise Control Act of 1972, P.L. 92-574. The consideration and passage of that legislation reflects three factors that are pertinent to the resolution of the preemption issue presented by the instant case: (1) The control of noise is an increasingly important federal policy;³⁰ (2) Congress does not as yet feel that adequate information exists upon which to base any comprehensive federal program of aircraft noise control and desires that the question receive further study; and (3) in the interim, Congress does not wish to impair the existing balance of federal, State, and local power to deal with aircraft noise problems. Each of these factors supports the conclusion that Burbank's ordinance does not operate in an area of regulation that is federally preempted at the present time, and that its requirements are not incompatible with federal policy on control of aircraft noise.

certificates by the Administrator, has given him an additional method of regulating airport noise should he decide to do so. Thus, by exercising the authority conferred by Section 611 to apply noise standards and regulations "in the issuance, amendment, modification, suspension, or revocation of any certificate * * *," the Administrator could include noise standards or regulations in an airport operator's certificate issued under Section 612. The adoption of Section 612, however, does not reflect a congressional intent to preempt the area of noise regulation; the legislative history of that provision makes it clear that safety of flight was the only consideration underlying the new certification requirement, and that Congress gave no thought to airport-related noise problems in its consideration of the legislation. See H. Rep. No. 601, 91st Cong., 1st Sess., pp. 11-12.

³⁰ See Section 2 of the Act, App. A, *infra*, pp. 59-60.

Section 7 of the Noise Control Act of 1972 (App. A, *infra*, pp. 60-62) deals with the subject of "Aircraft Noise Standards." Subsection (a) directs the Administrator of the Environmental Protection Agency ("EPA") to conduct a study, the results of which are to be reported to Congress within nine months after enactment of the Act, covering the following topics:

* * * (1) adequacy of Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission standards on new and existing aircraft, together with recommendations on the retrofitting and phase-out of existing aircraft; (3) implications of identifying and achieving levels of cumulative noise exposure around airports; and (4) additional measures available to airport operators and local governments to control aircraft noise. * * *

Subsection (b) amends Section 611 of the Federal Aviation Act to afford EPA a consultative role in FAA's issuance of aircraft noise standards and regulations, in order to assure that those standards and regulations properly consider the environmental impact of aircraft noise on the public health and welfare.

That Congress was not prepared to legislate comprehensively on the subject of aircraft noise or, for the time being, to alter by statute the previously existing balance of federal and State authority is clear from the committee reports. In reporting out the Noise Control Act of 1972, the Senate Committee stated (S. Rep. No. 92-1160, 92d Cong., 2d Sess., pp. 10-11):²¹

²¹ See also 118 Cong. Rec. (daily ed.) S. 17758 (remarks of Senator Tunney).

The Committee considered approaches to controlling aircraft noise based on a concept of cumulative noise exposure, involving the level of noise from aircraft to which individuals in the areas surrounding airports are exposed and the effects of such exposure on public health and welfare. While methods other than noise emission standards can be effectively utilized to reduce aircraft noise, the Committee felt that it had insufficient knowledge as to the precise regulatory mechanism for cumulative aircraft noise exposure. Therefore, the Committee included in the bill, in place of any regulatory scheme dealing with community noise around airports, a one year study by the EPA of the implications of identifying and achieving levels of cumulative noise exposures around airports. The results of this study, submitted to the Committees on Public Works and Commerce of the Senate and the Committee on Interstate and Foreign Commerce of the House with legislative recommendations, will form the basis for any legislation on aircraft noise in the next Congress.

* * * * *

States and local governments are preempted from establishing or enforcing noise emission standards for aircraft unless such standards are identical to standards prescribed under this bill.²³ *This does not address responsibilities or powers of airport operators, and no provision of the bill is intended to alter in any way the relationship between the authority of the Fed-*

²³ This sentence refers to the preemption provision in the Senate version of the bill, which was not ultimately adopted. See note 36, *infra*.

eral government and that of State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill.
[Emphasis supplied.]

The House bill had been reported earlier with an identical disclaimer against altering the pre-existing balance of federal and State authority. H. Rep. No. 92-842, 92d Cong., 2d Sess., p. 10.

As discussed above, the pre-existing balance recognized the legitimacy of night curfews imposed by the States and their instrumentalities. In considering the Noise Control Act of 1972, Congress acted upon the assumption that States and localities do presently have such authority.

During the Senate hearings on the Noise Control Act, an EPA representative testified that it understood that night curfews were within the State police powers:³³

The reduction of noise associated with air transportation involves considerably more than engine source control even though that in itself is significant. Involved could be changes in landing and takeoff procedures, an FAA responsibility; airspace utilization and allocation around airports, a responsibility shared by the FAA and the airport operator; or modification in schedules, which is a function of the airlines, the airport operator, and the CAB.

³³ Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, on S. 1016, Noise Pollution, 92d Cong., 2d Sess., p. 330 (hereafter "Senate Hearings on the 1972 Noise Control Act"); see also *id.* at 347-348, 352.

There are also other possibilities, such as the imposition of curfews, and the use of special licenses, which are the function of State and local governments. [Emphasis supplied.]

Night curfews were already in existence at Washington National Airport, Morristown, New Jersey, and London, England. Similar curfews were said to exist in "many major European cities." 118 Cong. Rec. (daily ed.) H. 1534; see also Hearings before the Subcommittee on Public Health and Environment of the House Committee on Interstate and Foreign Commerce, on H.R. 5275, Noise Control, 92d Cong., 1st Sess., p. 485.

The persistence of the noise problem had led to the development of highly sophisticated State and local efforts at regulating ambient noise levels, which in turn gave Congress further pause before changing the regulatory balance that had been struck in the Federal Aviation Act of 1958. Senate Hearings on the 1972 Noise Control Act, pp. 115-154, 185-267. For example, Congress was informed that the State of California had recently enacted airport ambient noise control standards (Calif. Pub. Utilities Code, Section 21669), which were soon to be made effective. *Id.* at 98, 105, 166. Senator Tunney, the Senate manager of the Noise Control Act of 1972, made clear his position that he would not support legislation that would preempt California's efforts. *Id.* at 329.

On the House floor, Congressman Collier, who had participated in the 1962 aircraft noise hearings,³⁴ recalled:

³⁴ House Hearings on Aircraft Noise Problems, *supra*, at 267 and 671. Mr. Collier's statement, quoted in the text, regarding

This problem of establishing curfews and going to the FAA seeking regulations which provide for relief from the noise problem in the area is nothing new. I served on the Aviation Subcommittee 15 years ago when we were dealing with this very problem. But I think we ought to get one thing straight: We have a curfew at Washington National Airport because Washington National Airport and Dulles are in a totally unique position. They are not municipally operated but instead are under control of the Federal Government. O'Hare International Airport is operated by the Chicago Municipal Airport Authority. There would be not one plane going in or out of O'Hare field after 11 o'clock at night if the local airport authority did not approve it. So it is well and good to suggest bringing the complaints to Washington and have the FAA do the job when in reality the responsibility presently exists with the local airport authority.

So let us not beat around the bush here. If you want this job done, *I suggest that if you have an interest in providing this relief, you should go to the Chicago Airport Authority, which is an arm of the city administration of Chicago, get relief at the source. They have the power to stop any flights after 11 o'clock, if, in fact, we want a curfew. I think that ought to be made eminently clear, and I hope [I] have done so today. [Emphasis supplied.]* ¹¹

his service on the Aviation Subcommittee in 1957 appears to be an inaccurate recollection.

¹¹ 118 Cong. Rec. (daily ed.) H 1535-1536.

In sum, far from creating or reinforcing a comprehensive scheme of federal regulation of aircraft noise, the Noise Control Act of 1972 is most significant for its enunciation of a federal policy to minimize such noise wherever practicable and for the determination that a comprehensive federal policy must await further study of the problem. Such further study may well result in the adoption of a comprehensive scheme and a determination to exclude concurrent or supplementary State regulation, but so far Congress has not excluded such regulation in the traditional spheres of State and local authority, including control of airports.²²

C. THE PROPRIETARY-POLICE POWER DISTINCTION RELIED UPON BY
THE COURT OF APPEALS IS NOT VALID

The foregoing review of the legislative history of congressional enactments touching the subject of aircraft noise abatement indicates that Congress has at no time intended to preempt State and local authori-

²² While we agree with the Supplemental Brief of the Attorney General of the State of California that the history of the Noise Control Act of 1972 evinces a congressional intent to leave intact local regulatory power such as that exercised by Burbank in this case, we do not, as he does, reach this conclusion on the basis of the omission from the bill as enacted of the preemption provision contained in the Senate version. That provision (see State's Supplemental Brief, p. 15) was addressed to regulation of noise emission directed at aircraft and engine design, with respect to which the FAA had already been given comprehensive regulatory power in the 1968 amendment to the Federal Aviation Act. Had the provision been adopted, State and local noise abatement actions through airport control would not have been affected. The failure to adopt it is thus of no significance with regard to the issues presented by the present case.

ties from acting against aircraft noise by denying the use of their airports to certain types of aircraft or at certain times of the day. That history has not, however, focused upon the distinction between airport control in a proprietary capacity and airport control by means of the exercise of police power, and several references to the power of State and local governments to restrict airport use are framed in terms of the local government as an airport proprietor. See, *e.g.*, note 27, *supra*, and accompanying text.

The court of appeals, in response to Burbank's argument that the legislative history indicates a non-preemptive congressional intent, relied upon this distinction to explain away the thrust of the Senate report's approving reference to the letter of the Secretary of Transportation (S. Rep. No. 1353, *supra*). That letter had asserted continuing State and local authority in the area of noise regulation through airport control. The court stated (A. 422-423):

A State or local public agency, as the proprietor of an airport, can deny the use of its airport based on noise consideration; a State or local government cannot use its police power to do so. [Footnotes omitted.]

We cannot agree that this distinction applies to the determination whether the Burbank ordinance seeks to regulate in a federally preempted area. In the first place, it leads to a logically bizarre result. Since nearly every major airport in the United States is governmentally owned (Burbank being the most significant, if not the only, exception among airports used by certificated air carriers), the result of the court of

appeals' reasoning is that there is a federal preemption policy affecting at most a handful of airports in the entire nation.³⁷ The considerations of uniform national policy or centralized federal decision-making that ordinarily support preemption would not be furthered by a preemption having such insignificant national impact, and Congress should not be assumed to have legislated such a result in the absence of clear evidence of such intent.

Moreover, while the letter from the Secretary of Transportation quoted in the opinion of the court of appeals spoke in terms of local public agencies acting "as proprietors," the context indicates that the intention was to distinguish between local governmental entities having jurisdiction over an airport and those not having *any* jurisdictional tie. Such a reading accords with the fact that practically every major airport in the country was owned by a local government or a local or regional authority; we have, indeed, found nothing in the legislative history suggesting that any thought or concern was addressed to problems that might be presented by privately-owned airports. Furthermore, such a reading is consistent with the prevailing concern, at the time the letter was sent, about efforts by communities adjoining airports to impose restrictions impinging upon federal regulation of aircraft flight.

This concern is evidenced by the letter's reference to the decision of the district court in *American Airlines*,

³⁷ There are, of course, a number of privately owned airports throughout the country that serve general aviation only; but these airports do not present such serious noise problems.

Inc. v. Town of Hempstead, 272 F. Supp. 226 (E.D.N.Y.), affirmed, 398 F. 2d 369 (C.A. 2), certiorari denied, 393 U.S. 1017, striking down an ordinance that sought to impose noise standards on aircraft passing over the town en route to or from New York's Kennedy International Airport. See also *American Airlines, Inc. v. City of Audubon Park, Kentucky*, 297 F. Supp. 207 (W.D. Ky.), affirmed *per curiam*, 407 F. 2d 1306 (C.A. 6), certiorari denied, 396 U.S. 845; *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 238 F. 2d 812 (C.A. 2). The cited decisions all involved efforts by local governments to regulate "the flight of aircraft," which, as the letter correctly noted, was a field already preempted.⁵⁸ None of these decisions is at all inconsistent with a holding that Burbank has the power to impose a night curfew on its airport. This context fully explains the terminology employed in the letter, and we believe it is unwarranted to infer any intent to exclude local governments having police power jurisdiction over airports from exercising such powers for noise abatement objectives.⁵⁹

We recognize that *Griggs v. Allegheny County*, 369 U.S. 84, imposing compensation liability for noise

⁵⁸ The decision of the court of appeals in the *Hempstead* case was rendered approximately three weeks after the letter of the Secretary of Transportation was sent. It rested solely on the ground of conflict between the ordinance and federal air traffic regulations and specifically declined to affirm the preemption finding of the district court. See 398 F. 2d at 376, n. 4.

⁵⁹ The absence of such intent is confirmed by the fact that the California airport noise control law was before Congress in its consideration of the Noise Control Act of 1972 and was assumed not to be within a preempted area. See p. 42, *supra*.

easements on governmental airport proprietors, cited by the court of appeals (A. 423, n. 8), affords a ground for distinguishing between local governmental action taken in a proprietary capacity and that reflecting an exercise of police power.⁴⁰ However, the existence of such a basis for distinction does not necessitate that the distinction in fact be drawn in every instance, and there are several reasons for not doing so here. First, there is no affirmative evidence of congressional intent to prohibit local governments from exercising police power over airports within their boundaries (as distinct from the exercise of such power over "the flight of aircraft" through the federally sovereign airspace overhead). Second, it is quite clear that the status of a local government as a proprietor, *Griggs* notwithstanding, would not insulate it from the exercise of federal control, to the extent Congress deems such control desirable in the execution of its powers and responsibilities under the Commerce Clause. Finally, as noted above, perpetuation of a proprietorship-police power distinction makes no practical sense in terms of the development of a rational and uniform federal policy, since the preemption thereby created would have such marginal effect.⁴¹ The distinction drawn by the court of appeals is thus not supported by the legislative history and not consonant with the practicalities of the situation.

⁴⁰ The *Griggs* decision was not, of course, in any way directly concerned with police power-proprietorship distinctions.

⁴¹ Thus, the night-time flight restrictions which the Department of Aeronautics of the City of Los Angeles, proprietor of Los Angeles International Airport, plans to put into effect

II

BURBANK'S ORDINANCE IS NOT IN CONFLICT WITH THE
TOWER CHIEF'S PREFERENTIAL RUNWAY ORDER

In addition to invalidating the Burbank night curfew ordinance on preemption grounds, the court of appeals further held that the ordinance violated the Supremacy Clause because it was in conflict with an informal runway preference order issued by the Tower Chief at the airport. This order directed tower personnel "normally" to assign runways in such a manner that aircraft would take off in and land from a westerly direction; to "make every effort" to have jet aircraft arrive from the west; and to have jet aircraft depart toward the west "as much as possible during the period from approximately 2300 to 0700 local time when people are asleep" (although the order was applicable at all times of day.) If a pilot requested a departure to the east, the controller was to "honor the request, traffic permitting, but inform the pilot that the runway is 'noise sensitive'." The order was expressly prompted by noise abatement considerations and stated that the procedures it recommended "are designed to reduce the community exposure to noise to the lowest practicable minimum" (A. 412).

The court of appeals, quoting from *Hines v. Davidowitz, supra*, 312 U.S. at 67, stated that the ordinance

on April 29, 1973, would pass muster under the rationale of the court of appeals even though that airport is the third busiest air carrier airport in the United States and in 1971 handled twelve times as many air carrier operations as Hollywood-Burbank. It seems to us highly unlikely that Congress would have intended a federal preemption that fails to reach this situation, while invalidating Burbank's ordinance.

"stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress" (A. 426). It also construed the runway preference order to represent a conscious "balance set by the FAA among the interests with which it is empowered to deal," in short, an affirmative determination that there should be no further restriction on aircraft operations at Burbank for noise abatement reasons. Neither of these conclusions is, we believe, warranted in the circumstances of this case.

In the 1958 Act, FAA was given authority to prescribe air traffic rules for the protection of persons and property on the ground (49 U.S.C. 1348(c)). Between 1958 and 1968, that authority was exercised only to the extent of establishing preferential runway requirements at a few selected noise-sensitive airports. These limited actions were taken concurrently with a tacit acceptance of noise control regulations imposed by airport operators such as the Port of New York Authority.⁴² Moreover, FAA's view of its limited and non-conflicting role in the noise abatement area was made clear in its assertions to Congress, in connection with the consideration of the noise abatement amendment to the Federal Aviation Act, regarding the continuing power of airport operators to regulate noise at their facilities.⁴³

With the passage of Section 611, FAA was given broad authority to regulate aircraft noise. The first

⁴² See pp. 18-19, 25-26, *supra*; *Port of New York Authority v. Eastern Air Lines, Inc.*, 259 F. Supp. 745, 750 (E.D.N.Y.).

⁴³ See the letters from the Department of Transportation to the congressional committees quoted at pp. 32-33 and 36, *supra*; also pp. 26-27, *supra*.

implementation of this authority (14 C.F.R. Part 36) was limited to prescribing noise emission standards applicable to aircraft certificated after 1969. In issuing these regulations, FAA specifically disavowed any attempt to preclude airport operators from taking such additional measures as they might deem necessary, "in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce" (34 Fed. Reg. 18355), to deal with noise problems generated by their airports. This determination to leave room for concurrent State and local regulation of aircraft noise through control over airports was consonant with the policy declared in the House report on Section 611 that the federal action should not be construed "as a license to permit noise" (H. Rep. No. 1463, *supra*, p. 5) but should merely be considered to establish noise ceilings."

In the context of past FAA practices and of its often enunciated position regarding the continuing role of local authorities in adopting noise abatement measures based upon airport control, the runway order was not intended to preclude further regulation by the airport operator (or, in Burbank's case, by the valid exercise of local police power over the airport operator). The "lowest practicable minimum" language relied upon by the court of appeals simply did not represent any consideration and rejection of the possibility of a locally imposed curfew on night operations; rather, the language reflected a conclusion that nothing more could practically be accomplished by means of different runway preference arrangements

"See pp. 33-34, *supra*.

or other conventional air traffic and airspace management procedures. Any rejection by FAA of night curfews as a means of accomplishing noise abatement at Burbank would have represented a major change in federal policy and certainly would have been stated explicitly.⁴⁵

In conclusion, nothing in the Burbank ordinance runs counter to the purposes of any congressional legislation in the area or any regulations of the FAA. The ordinance neither seeks to authorize conduct that federal regulations prohibit nor to require the cessation of practices dictated by federal rules. On the contrary, the ordinance represents the exercise of local jurisdiction of a sort that Congress has specifically seen fit not to disturb, directed at accomplishing a purpose in harmony with the most recent congressional declaration of policy regarding noise problems (Sec. 2 of the Noise Control Act of 1972, App. A, *infra*, pp. 59-60).⁴⁶

⁴⁵ This is not to say that FAA lacks the power to impose night curfews or to reject their imposition. We believe that Section 611 confers such power. See, *e.g.*, Remarks of Senator Tunney, 118 Cong. Rec. (daily ed.) S18644. So long, however, as the federal power remains unexercised, we believe that a finding of conflict cannot stand.

⁴⁶ Two decisions of district courts on similar issues reached the conclusion that airport use restrictions imposed by the Port of New York Authority were not in conflict with FAA regulations addressed to similar objectives. In *Aircraft Owners & Pilots Ass'n v. Port Authority of N.Y.*, 305 F. Supp. 93 (E.D. N.Y.), the court upheld a \$25 landing fee imposed by the Port Authority on small aircraft seeking to use any of New York's three air carrier airports during certain peak traffic hours, notwithstanding the fact that the FAA had promulgated a high density regulation permitting a certain number of landings each hour by aircraft of that type. The court upheld the Port Authority's fee as "[u]nited in general purpose" with the federal regulation. *Id.* at 105.

III

THE VALIDITY OF THE BURBANK ORDINANCE SHOULD BE ASSESSED ON THE BASIS OF ITS SPECIFIC IMPACT ON COMMERCE RATHER THAN ON THE BASIS OF THE THEORETICAL IMPACT OF NATIONWIDE CURFEWS

The district court held that Burbank's night curfew ordinance, in addition to being invalid under the Supremacy Clause on preemption and conflict grounds, was also invalid under the Commerce Clause as an undue burden on interstate commerce (A. 405). In so holding, the court relied not on the effect of Burbank's ordinance itself upon interstate commerce (A. 366), but on the effect that nationwide imposition of such curfews would have on commerce (A. 404). The court of appeals, stating it was deciding the case solely upon Supremacy Clause grounds (A. 414), did not discuss the Commerce Clause question.

The Supremacy Clause could invalidate the Burbank ordinance only if the federal power under the Commerce Clause had been exercised in a way that reflects a congressional determination to oust the states of their normal regulatory authority over local noise under their police powers. Cf. *The Slaughter-House*

In *Port of New York Authority v. Eastern Air Lines, Inc.*, *supra*, 259 F. Supp. 745 (E.D.N.Y.), the court upheld a prohibition on the use of a runway at LaGuardia Airport, notwithstanding the existence of an FAA preferential runway order involving the runway. The court relied in part on a letter from the Administrator of FAA advising that "in making the runway available for the fullest use required by safety considerations, we are not directing that the runway be used." *Id.* at 753. Similarly, in the instant case, the preferential runway order was not a directive that the runways be used, but merely established preferences in the event they are in fact to be used.

Cases, 16 Wall. 36. Thus, the holding of the court of appeals necessarily reflects the conclusion that "Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded state action." *Oregon-Washington R.R. v. Washington*, 270 U.S. 87, 101.

As we have argued in this brief, we do not think that Congress has exercised its power over interstate commerce so as to bar the City of Burbank from adopting its anti-noise ordinance. In making this argument, we contend only that neither Congress nor the federal regulatory authorities have thus far exercised their full authority under the commerce power to deal with this subject. The power of Congress over interstate commerce is plenary and supreme. But there are some things that the States can regulate until Congress takes over. The question in this case is not one of the power of Congress, but of the extent that Congress has exercised that power.

We have no doubt that Congress at any time could adopt legislation expressly excluding some or all local airport curfews. Congress has conferred extensive power under Section 611 of the Act upon the Administrator of the Federal Aviation Administration to deal with noise problems. The Administrator, however, has not yet exercised that power by means of regulations directed at airport noise, although he is free to do so at any time. As the legislative history previously discussed indicates, the mere conferral of authority on the Administrator was not intended to oust the States of power to deal with airport noise.

The Commerce Clause of its own force and without regard to any action by Congress may preclude state

action that unduly burdens interstate commerce. To the extent that the district court's invalidation of the Burbank ordinance may have rested upon this theory, the court of appeals did not decide the issue. We submit, however, that the Burbank ordinance is not invalid as, by itself, an undue burden on interstate commerce.

"State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 448. There is no suggestion that the ordinance discriminates in any way against interstate commerce, and, in actual operation, the ordinance has not been shown to have accomplished a significant disruption of interstate commerce. Only one scheduled airline flight per week was affected, and that was an intrastate operation by a carrier not certificated by the Civil Aeronautics Board. Otherwise, the impact of the ordinance was confined to a relatively small number of business jet operations, and the plaintiffs failed to show that the prohibition of these flights resulted in any perceptible impact on commerce."

"The record is devoid, for example, of any analysis of the actual impact of any diversion or cancellation of business flights resulting from the curfew ordinance. Conceivably, the need to divert or cancel some of its flights might lead a corporation to move its entire fleet to another airport in the area to avoid crew or aircraft positioning or maintenance problems. Alternatively, to avoid these problems the curfew might require ferry flights between airports during non-prohibited hours and result in a substantial increase in operating costs—and noise. Without a determination of these facts, one can only speculate as to the actual impact of the ordinance on business jet operations.

Compare *Huron Cement, supra*, with *Florida Avocado Growers v. Paul, supra*, 373 U.S. at 153-156.

It is argued that the ordinance should be evaluated not on the basis of its negligible individual effect, but on the basis of the effect on commerce of nationwide adoption of such curfews.⁴⁸ While such an approach might be appropriate in some cases, we believe it is not correct in the present case. As we have previously indicated, we do not believe that maintenance of an effective national air transport system requires prohibiting a curfew at every airport; we do not think that all airports need be treated alike, or that a curfew is necessarily burdensome, *per se*. Moreover, the background, detailed at length above, of congressional understanding that local authorities retain power to effectuate noise abatement through their control of airports, including measures such as curfews, means, at a minimum, that a particular curfew such as Burbank's should be evaluated on the basis of its specific impact rather than on the basis of the theoretical effect of nationwide curfews.⁴⁹

⁴⁸ As in *Huron Cement, supra*, the argument regarding nationwide adoption of similar ordinances was not supported by actual instances, but was predicated upon speculation about ordinances or rules not yet in existence.

⁴⁹ In considering the specific impact of a curfew ordinance, it would be appropriate to consider it in relation to other existing curfews.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1973.

APPENDIX A

Article I, Section 8, Clause 3 of the Constitution of the United States reads as follows:

The Congress shall have power * * *

* * * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Article VI, Clause 2 of the Constitution of the United States reads as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Noise Control Act of 1972, P.L. 92-574 (Oct. 27, 1972), reads as follows:

(a) The Congress finds—

(1) that inadequately controlled noise presents a growing danger to the health and welfare of the Nation's population, particularly in urban areas;

(2) that the major sources of noise include transportation vehicles and equipment, machinery, appliances, and other products in commerce; and

(3) that, while primary responsibility for control of noise rests with State and

(59)

local governments, Federal action is essential to deal with major noise sources in commerce control of which requires national uniformity of treatment.

(b) The Congress declares that it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare. To that end, it is the purpose of this Act to establish a means for effective coordination of Federal research and activities in noise control, to authorize the establishment of Federal noise emission standards for products distributed in commerce, and to provide information to the public respecting the noise emission and noise reduction characteristics of such products.

Section 7 of the Noise Control Act of 1972 reads in pertinent part as follows:

(a) The Administrator, after consultation with appropriate Federal, State, and local agencies and interested persons, shall conduct a study of the (1) adequacy of Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission standards on new and existing aircraft, together with recommendations on the retrofitting and phaseout of existing aircraft; (3) implications of identifying and achieving levels of cumulative noise exposure around airports; and (4) additional measures available to airport operators and local governments to control aircraft noise. He shall report on such study to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committees on Commerce and Public Works of the Senate within nine months after the date of the enactment of this Act.

(b) Section 611 of the Federal Aviation Act of 1958 (49 U.S.C. 1431) is amended to read as follows:

"CONTROL AND ABATEMENT OF AIRCRAFT NOISE AND SONIC BOOM

"SEC. 611. (a) For purposes of this section:

"(1) The term 'FAA' means Administrator of the Federal Aviation Administration.

"(2) The term 'EPA' means the Administrator of the Environmental Protection Agency.

"(b) (1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title. No exemption with respect to any standard or regulation under this section may be granted under any provision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted.

"(2) The FAA shall not issue an original type certificate under section 603(a) of this Act for any aircraft for which substantial noise abatement can be achieved by prescribing standards and regulations in accordance with this section, unless he shall have prescribed

standards and regulations in accordance with this section which apply to such aircraft and which protect the public from aircraft noise and sonic boom, consistent with the considerations listed in subsection (d)."

* * * * *

49 U.S.C. 1348 reads in pertinent part as follows:

§ 1348. Airspace control and facilities.

(a) Use of airspace.

The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rules, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

* * * * *

(c) Air traffic rules.

The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

* * * * *

Section 20-32.1 of the Burbank Municipal Code reads as follows:

(a) Pure Jets Prohibited from Taking Off Between 11:00 P.M. and 7:00 A.M.

It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

(b) Airport Operator Prohibited from Allowing Take-Offs.

It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

(c) Exception: Emergencies.

This Section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off.

APPENDIX B

OFFICE OF THE SECRETARY OF TRANSPORTATION,
Washington, D.C., March 1, 1968.

HON. SAMUEL N. FRIEDEL,
*Chairman, Subcommittee on Transportation and
Aeronautics, Committee on Interstate and For-
eign Commerce, House of Representatives, Wash-
ington, D.C.*

DEAR MR. CHAIRMAN: I refer to your request for this Department's comments on H.R. 14146, a bill relating to aircraft noise regulation. This is a bill proposed by the Air Transport Association of America (ATA) in testimony before the Transportation and Aeronautics Subcommittee last fall.

The ATA bill would require the Administrator of the Federal Aviation Administration to prescribe standards for the measurement of aircraft noise and sonic boom and to issue aircraft type certificates if the aircraft for which the certificate is sought meets noise standards. It would also authorize the Administrator to issue an order amending, modifying, suspending, or revoking an aircraft type certificate if such action was necessary "to encourage progress in aircraft noise or sonic boom abatement" and if required in the public interest. Such orders would be subject to appeal to the National Transportation Safety Board and subsequent judicial review. The ATA bill would prohibit the Administrator from amending, modifying, suspending, or revoking any airworthiness certificate for purposes of aircraft noise or sonic boom abatement.

The Department is opposed to the ATA version of the noise abatement bill for a number of reasons:

1. The ATA bill would vest the authority for regulation of aircraft noise and sonic boom in the Administrator of the Federal Aviation Administration rather than the Secretary of Transportation. ATA offers as the reasons for this change from the Administration's bill the arguments that it would require the issuance of two type certificates, one for noise and one for safety, and that, in authorizing the Secretary to promulgate noise and sonic boom regulations, it could operate to subvert safety considerations to noise and sonic boom judgments.

Only one certificate would be issued, not two. The Secretary's authority under existing statutes to carry out operating programs has been routinely delegated to the Administrators of the modal administrations within the Department. In the same manner the administration of aircraft noise and sonic boom certifications would be operationally carried out by the Administrator of the Federal Aviation Administration in conjunction with his present activities relating to air safety. FAA personnel regularly engaged in certification activities would simply apply the noise and sonic boom standards in the course of their certification work. The practical administrative effect, therefore, would be similar to that proposed in the ATA bill. The difference, and we believe it to be a significant one, is that final decision-making authority with respect to noise abatement and sonic boom standards would be available to the Secretary should he choose to exercise it.

The ATA argument that safety considerations may be ignored if the Secretary is authorized to establish aircraft noise and sonic boom standards is difficult to understand. First, it overlooks the fact that the De-

partment is totally committed to assuring safety in aviation and all other modes of transportation. Second, it overlooks the fundamental manner in which noise standards and safety standards interact. Both noise standards and safety standards must be set with full knowledge of, and complete reliance on the state of the aeronautical art. It would be clearly unreasonable to establish a noise standard having an adverse effect on safety which could not be corrected or compensated for by our existing technical knowledge. The real issue which is present, even in our current certification processes, concerns the cost of complying with a standard and whether the benefit is worth the added cost.

The FAA Administrator, acting under delegation from the Secretary, would not be free to set a noise standard without taking into consideration all its costs, including those necessary to maintain an adequate level of safety. To assume that he or the Secretary would fail to weigh safety considerations, or weigh and then disregard them, is simply untenable. The need for compensating measures necessary to maintain safety, and their costs, would have to be considered in determining the reasonableness of the Government's action to apply a noise standard.

In vesting authority directly in the Administrator rather than the Secretary, the ATA bill is attempting to draw an analogy from the Department of Transportation Act. However, the logic of the statutory delegation of certain safety functions to the modal Administrators in the Department of Transportation Act, which was to insulate the safety regulatory function, has no application in the aircraft noise area. Congress has specifically directed the Secretary to develop a national transportation system which is compatible with other national objectives, one of the fore-

most of which is improving the quality of our environment. The control of aircraft noise and sonic boom raises fundamental questions as to the compatibility of air transportation with the rest of our environment. The judgments to be exercised with respect to the environmental compatibility of our transportation systems are precisely the ones which are not best reserved to the Administrators of the modes of transportation involved. These broad environmental issues require a balancing of national interests, for which the Secretary must assume the ultimate responsibility within the Department.

2. The ATA bill seeks to make mandatory the imposition of aircraft noise and sonic boom certification. ATA argues that this is necessary in order to achieve maximum preemption by the Federal Government of the field of aircraft noise regulation. As a practical matter, and as ATA concedes in its testimony, the only regulatory authority left to local communities or airport operators is the authority of the airport operator, in the exercise of its proprietary function, to limit on noise grounds the kind of aircraft which may use its facility. The Department is firmly convinced that such authority in the airport operator should continue. Local communities should, if not inconsistent with overriding national interests, have the option to determine the effects of transportation on their environment. We do not believe that the mere presence of authority in the Federal Government to certify for noise purposes, or the exercise of that authority, should foreclose an airport operator from exercising his judgment or responding to the desires of the community with respect to aircraft noise. An action by an airport proprietor to exclude aircraft which exceed noise levels established by him does not

conflict with the Federal authority to regulate air traffic.

The exercise of this and other authority by local communities should continue. Local communities select airport sites and determine where they best will serve community needs. They bear the responsibility for insuring compatible land use in the airport environs. They have the necessary promotional, proprietary, planning and land use authorities to carry out this responsibility. They have a very influential voice in determining the type of service they want through their appearances in route proceedings before the CAB. In short, given the limits imposed by aeronautical technology, the community can and should continue to bear a heavy share of the responsibility for assuring the compatibility of the air service they seek and enjoy with the environmental objectives of the community.

This combination of local authority and local interest provided the rationale for the Supreme Court's decision in *Griggs v. Allegheny County* in which the Court found the local airport authority, rather than the Federal Government, responsible for a "taking" of property due to aircraft noise. It would be unwise to take action which could raise argument undermining this rationale. We believe that total preemption of the aircraft noise regulatory field by the Federal Government, as recommended by ATA, could be so regarded.

3. The scope of the bill proposed by ATA is too narrow in that it authorizes only prospective noise abatement action. The Department believes that effective control of aircraft noise and sonic boom requires as a minimum (1) the authority to apply noise standards, rules, and regulations to the issuance of type certificates, both prospectively and retroactively to the date of the application therefor, and (2)

the authority to prescribe standards, rules, and regulations affecting the operation of aircraft as may be necessary.

While quite obviously any governmental decision to require the retrofitting of existing aircraft to reduce noise levels would have to be very carefully weighed from the standpoint of the benefits to be gained versus the costs necessarily imposed, the authority to do so ought to be available should technology and circumstances indicate that such retrofitting was necessary in the public interest. Industry and the public would be protected from the irresponsible exercise of that authority by the appeals permitted either to an impartial board or to the courts, as the case may be.

We would strenuously object to the ATA proposal prohibiting an action to amend, modify, suspend, or revoke an airworthiness certificate for noise abatement or sonic boom purposes. If an aircraft in operation by a carrier ceases to conform to its type certificate, an action against the airworthiness certificate should be available.

4. There are some serious technical deficiencies in the ATA bill. The bill would authorize the prescribing of standards only for "the measurement of aircraft noise and sonic boom". It will be necessary not only to establish standards for the measurement of noise but also to prescribe allowable noise emission levels which aircraft must meet. Measurement alone is insufficient. We also think the finding required to support the standard, that it is "necessary and appropriate to encourage progress in aircraft noise abatement", is too vague. We think the objective is to control and abate aircraft noise and this should be the finding necessary to support a standard. Of course, in any rule-making action, the test of reasonableness will also be present.

ATA expressed concern about the proposed section of H.R. 3400. It is clear that section (which provides for appeal to the courts of law by the Board) will apply to actions taken on certificates for reasons of noise abatement and boom under the proposed section 611. We believe unnecessary to repeat the provisions of section in section 611.

In summary, the Department would support which (1) authorized the Secretary to prescribe amend standards for the measurement of aircraft noise and sonic boom, and to prescribe standards, rules, and regulations as necessary to provide for control and abatement of aircraft noise and boom; (2) authorized the Secretary to apply standards, rules, and regulations to the issuance of aircraft type certificate, regardless of the date of application for the certificate; (3) authorized the Secretary to amend, modify, suspend, or revoke certificates and airworthiness certificates for noise and sonic boom purposes; and (4) authorized the National Transportation Safety Board to amend, modify, or reverse an order of the Secretary on a finding that control and abatement of aircraft noise or sonic boom and the public interest did not require affirming the order. A bill incorporating these features would be acceptable to the Department and would be consistent with the position taken by ATA.

The Bureau of the Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report for consideration of the Committee.

Sincerely yours,

JOHN L. SWEENEY,
Assistant Secretary for Public Affairs

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IN THE
Supreme Court of the United States

October Term, 1972

No. 71-1637

THE CITY OF BURBANK, a municipal corporation; DR. JARVEY GILBERT, Mayor; ROBERT R. McKENZIE, Vice Mayor; Councilman GEORGE W. HAVEN; Councilman ROBERT A. SWANSON; Councilman D. VERNER GIBSON; JOSEPH N. BAKER, City Manager; SAMUEL GORLICK, City Attorney for the City of Burbank and REX R. ANDREWS, Chief of Police of the City of Burbank,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., a corporation, PACIFIC SOUTHWEST AIR LINES, a corporation, and AIR TRANSPORT ASSOCIATION OF AMERICA,

Appellees.

On Appeal From the United States Court of Appeals
for the Ninth Circuit.

REPLY BRIEF OF THE APPELLANTS.

The purpose of this reply is not to re-argue the case for the Appellants. It is made necessary by Appellees' misstatement of certain of the issues and facts, as well as by the use of certain factual material and court decisions in some of the opposing briefs, particularly in the brief of the Appellees. We will attempt in this reply to cover the more serious deviations.

ARGUMENT.

1. Misstatement of Issues.

The four issues of law submitted by the Plaintiffs (Appellees here) for the District Court's determination, and in turn for determination by the Court of Appeals, were the first four issues set forth in the Pretrial Conference Order (A. 55). These issues, in a slightly abbreviated form, were carried over and considered by the District Judge in his Memorandum for Use in Preparation of Proposed Findings of Fact, Conclusions of Law, and Judgment (A. 342). The same issues are set forth in Appellants' Brief (pp. 4-5).

However, at page 2 of Appellees' Brief, an attempt is made to reshape the issues. A comparison will show substantial deviations from the issues presented for decision.

The greatest variance is found in Appellees' attempted restatement of the Commerce Clause issue. This issue of law, as set forth in the Pretrial Conference Order (A. 55), is stated to be:

"2. Whether enforcement of the curfew ordinance would result in an intolerable and unreasonable burden on interstate commerce in violation of the Commerce Clause (Art. I, §8, Cl. 3) of the United States Constitution."

The District Judge, in his Memorandum, abbreviated this issue to read (A. 342):

"(3) Would the enforcement of the Ordinance result in intolerable and unreasonable burden on interstate commerce?"

The Appellees now state this issue to be (Appellees' Brief, p. 2):

"4. Does the burden imposed on interstate commerce by enforcement of a local curfew render the Burbank ordinance invalid?"

Appellees give no explanation as to why they are belatedly attempting to change this issue. We are involved here with the Burbank Ordinance, not with the ordinance of some other city which *might* impose "an intolerable and unreasonable burden on interstate commerce." This issue, as rephrased by the Appellees, assumes a factual circumstance which finds no support in the record. There is no evidence or finding that the Burbank Ordinance, in its operation and effect, burdened interstate commerce in any respect.¹ The only answer to the issue as presented in the District Court was that it did not.² We do not believe that this at-

¹The only evidence in the record which could be considered as having any bearing on the issue as submitted to the District Court, is that summarized in Finding of Fact No. 66 (A. 395) which dealt with the possibility of Continental's adding an after-dinner flight from Seattle to Burbank and on to Ontario "should sufficient demand develop." More than two years have passed since Continental introduced service on this route [See Pl. Ex. 42]. Not only has no after-dinner flight been added, but two flights (No. 303 and No. 304) have been cancelled.

²The District Judge concedes as much by the statement in his Memorandum (A. 366): "Considered singly, such an Ordinance might not impose an unlawful interference with interstate commerce in all cases." Prior to this he had made the following observation (A. 366): "The evidence shows that if Seattle imposed an ordinance similar to the BuOr no jet aircraft could leave Seattle, or any city in the Northwest, for HBA after 7:00 P.M., nor could a plane depart HBA for Seattle after 7:00 P.M. in order to arrive at the respective destinations before the nocturnal curfew hour of 11:00 P.M." This latter statement is patently erroneous since the Burbank Ordinance only restricted take-offs, not landings.

tempt by Appellees to divert attention from their failure of proof in this regard should be permitted to go unnoticed.

2. Runway Preference Orders.

Appellees suggest (for the first time) that violation by a pilot of the runway preference order [BUR 7100.5B] issued by the Chief of the Hollywood-Burbank Airport Traffic Control Tower would subject him "to a civil penalty and to suspension or revocation of his airman's certificate", and would have the Court believe that pilots were required to use the preferential runway established by the order unless deviation was "permitted" by the control tower (Appellees' Br., pp. 13, 66). These misstatements of fact could possibly be overlooked if the order had not played such a prominent part in the decision of the Court of Appeals.

The order in question contains the following provision (A. 454):

"4. . . . The procedures are *not* mandatory on the part of pilots, however, traffic controllers must be noise abatement conscious and emphasize noise abatement in order to obtain the highest degree of *voluntary cooperation* from pilots." (Italics added).

The same provision is found in the three previous orders (A. 456, 458 and 460). The testimony to which the Appellees make reference is to the same effect (A. 317-318, 322-323).³

³e.g. "Q. . . . To what extent was it [BUR 7100.5B] observed by the pilots who took off during the period from 11:00 p.m. to 7:00 a.m.?"

"A. [Roman Lemmer, Chief Controller, Hollywood-Burbank Tower] We had very, very good cooperation on the part of the pilots, when we did assign the runway." (A. 317-318).

3. Letter of Secretary of Transportation.

Appellees in their brief (pp. 31-32) and the Port Authority of New York and New Jersey in its brief (pp. 7-9) seek to support their preemption arguments by reference to the first paragraph of the letter of the Secretary of Transportation dated June 22, 1968 included in Senate Report No. 1353.⁴ In this letter, the Secretary, after citing *American Airlines v. Town of Hempstead*, 272 F.Supp. 226 (U.S.D.C., E.D., N.Y., 1966), expresses the view that "States and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." Again we turn to the Opinion of the Federal Aviation Administrator in the *Dreifus* matter (Appendix to Appellants' Br., p. 4) for further enlightenment. There the Petitioner argued (p. 5):

"(6) The exclusive jurisdiction of the FAA in the field of aircraft noise abatement was upheld in the case of *American Airlines, Inc. v. Town of Hempstead*, 272 Fed.Supp. 226 (1966)."

The response of the Administrator was as follows (p. 11):

"Petitioner's argument 6, implying that the case of *American Airlines, Inc. v. Town of Hempstead* requires that the FAA issue time limitations for the Santa Monica airport is not supportable. While this case stated that noise limiting rules operating as those of the Hempstead ordinance must come from a Federal source, the material quoted from the Senate Report distinguished such ordinances from the action taken, by airport proprietors, to exclude aircraft, using their airports, because of

⁴The letter is set out in full in the Appendix to the Brief of Appellants (pp. 1-2).

noise considerations. The Hempstead ordinance was not an action taken by an airport proprietor to exclude aircraft from the airport."

We must add that neither was the Hempstead ordinance an action taken by a municipality with respect to the proprietor of an airport located within its boundaries which required the airport proprietor to impose time limitations on jet takeoffs. It would have been more in point if the Administrator had directed the Petitioner's attention to that portion of the District Court's opinion which immediately preceded the portion quoted in the letter of the Secretary of Transportation, viz. (272 F.Supp. 226, 231):

"... Given the necessary effect of the ordinance as it applies to interstate and international *aircraft flights in the navigable air space* surrounding Kennedy Airport, it must be concluded on the present record that the ordinance is invalid." (Italics added).

So it is abundantly clear that the "area committed to Federal care" was, in the opinion of the District Court, the *navigable air space*. Even this support for the views expressed by the Secretary of Transportation and the Federal Aviation Administrator, upon which the Appellees and their *amici* rely, was removed when, on appeal, the Court of Appeals for the Second Circuit refused to hold that Congress had preempted the field of aircraft noise abatement (398 F.2d 369, 376)⁸ and this Court denied certiorari (393 U.S. 1017).

⁸The Court of Appeals for the Second Circuit also had this to say (footnote 4):

"But the problem arises that it is this particular noise ordinance in this particular setting which is found to regulate flight paths and procedures; *another noise ordinance might not have that effect.*" (Italics added).

4. Noise Control Act of 1972.

Possibly the most transparent of the efforts of the Appellees and their *amici* is the attempt to support their preemption arguments by reference to the legislative history of the Noise Control Act of 1972 (Pub. L. No. 92-574, 86 Stat. 1234) and various statements made by members of the House and Senate during the course of its enactment. The Senate Report (Public Works Committee) No. 92-1160, September 19, 1972, and the minority views of Senator Muskie,⁴ which accompanied Senate Bill 3342 are of no value in the determination of Congressional intent, since that bill was not enacted. The House Report (Interstate and Foreign Commerce Committee) No. 92-842, February 19, 1972, which accompanied House of Representative Bill 11021, has some pertinence. While the Appellees and the Port Authority of New York and New Jersey quote a small portion of this report in their briefs, they have neglected to bring to the Court's attention the following portion (p. 9):

"Localities are not preempted from the use of their well-established powers to engage in zoning, land use planning, curfews and other similar requirements. For example, the recently-enacted Chicago Noise Ordinance provides that heavy equipment for construction may not be used between 9:30 p.m. and 8:00 a.m. within 600 feet of a hospital or residence except for public improve-

⁴One of the *amici* (National Business Aircraft Association, Inc.) goes so far as to suggest that Mr. Muskie's views also related to the final version of H.R. 11021 (See p. 56 of its brief). Nothing could be further from the truth. Mr. Muskie was referring to the final version of S. 3342 which was considered and rejected by the House on October 18, 1972 (See 118 Cong.Rec. (daily ed. Oct. 18, 1972) No. 169, pp. H. 10287, *et seq.*).

ment or public service utility work. The ordinance further provides that the motor of a vehicle in excess of four tons standing on private property and within 150 feet of residential property may not be operated for more than two consecutive minutes unless within a completely enclosed structure. Such local provisions would not be preempted by the Federal Government by virtue of the reported bill.

"The Committee gave some consideration to the establishment of a Federal ambient noise standard, but rejected the concept. *Establishment of a Federal ambient noise standard would in effect, put the Federal government in the position of establishing land use zoning requirements on the basis of noise—i.e., noise levels to be permitted in residential areas, in business areas, in manufacturing and residential areas; and within those areas for different times of the day or night. It is the Committee's view that this function is one more properly that of the States and their political subdivision, and that the Federal Government should provide guidance and leadership to the States in undertaking this effort.*" (Italics added).

The National Business Aircraft Association, Inc., in its brief, attempts to avoid this evidence of Congressional intent (see p. 53), but in contradiction of this effort favor us with a portion of the legislative history of the Federal Aviation Act of 1958 which clearly indicates that Congress by that enactment did not intend to assume control of the ground (see p. 33). The above quoted portion of the House Report is found under the heading "Responsibilities of the Federal Government,

the States, and their Political Subdivisions in Abating and Controlling Noise". We submit that it lends support to our contention that Congress has not preempted the ability of a municipality to enact and enforce reasonable and necessary land use regulations to protect their residents from the nuisance of jet aircraft noise during the hours normally devoted to sleep (see Appellants' Br., p. 57).

Whatever may be the proper construction and meaning of the House Report, the fact remains that both Houses of Congress specifically considered the question as to whether States and local governments should be preempted from prescribing and enforcing noise emission standards for aircraft and aircraft engines. The Senate Bill (S. 3342), which contained this preemptive provision, was read and considered by the House on October 18, 1972 (118 Cong.Rec. (daily ed. October 18, 1972) No. 169, pp. H. 10287, *et seq.*). It was rejected by the House in favor of H.R. 11021 which had been at that time amended to include three provisions of Senate Bill 3342. Included were the substance of the provisions of the Senate bill which preempted the right of States and political subdivisions to control, license, regulate or restrict the use, operation or movement of surface carriers (railroads and motor carriers) unless the Administrator of the Environmental Protection Agency determined that such were necessitated by special local conditions or not in conflict with regulations promulgated by him.⁷ *The preemptive provision of the Senate bill relating to aircraft and air-*

⁷Compare Sections 513 and 523 of S. 3342 (118 Cong.Rec. (daily ed., Oct. 18, 1972) No. 169 at p. H. 10294) with Sections 17(c)(2) and 18(c)(2) of H.R. 11021 (*Id.* at pp. H. 10299, H. 10300).

*craft engines was not included.*⁸ Nor were the preemptive provisions relating to surface carriers extended to include air carriers. Clearly, the question was before the House. It chose to preempt in one area (surface carriers) and rejected preemption in the other area (air carriers). It is doubtful that there could be more conclusive evidence of Congressional intent. Its force cannot be diminished by reference to Committee reports or statements of members of the House and Senate.

When the action of the House was reported to the Senate, H.R. 11021 as amended was read and considered by the Senate.⁹ The Senate concurred.¹⁰ Senator Tunney took comfort from the fact that the House had included some of the provisions of the Senate bill, particularly the preemptive provisions relating to surface carriers.¹¹ While there is no doubt

⁸S. 3342, Sec. 505: "No State or political subdivision thereof may adopt or enforce any standard respecting noise emissions from any aircraft or engine thereof." (*Id.* at p. H. 10293).

⁹118 Cong.Rec. (daily ed., Oct. 18, 1972) No. 169, at pp. S. 18638 *et seq.*

¹⁰*Id.* at p. S. 18646.

¹¹*Id.* at p. S. 18645. In that regard Senator Tunney stated:

"... the House has accepted the Senate proposal which authorizes the Environmental Protection Agency to establish regulations for control of noise from interstate carriers, including railroads, trucks and buses. The purpose of the amendment is to reduce the impact of conflicting State and local noise controls on interstate carriers.

"I would stress, Mr. President, that the preemption provided in these sections only occurs in areas of regulation where adequate Federal regulations are in effect. And, equally important, Mr. President, is that Federal regulations must be stringent enough to meet the varying local conditions affected by interstate carriers. Not only must the Administrator establish regulations which protect public health and welfare from noise from these interstate carriers in the average situation but he must also design his regulations so that the public health and welfare is protected

that Senator Tunney and a majority of the Senate preferred the Senate bill, the bill which became law was H.R. 11021.

5. Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.

Appellees seek to blunt the effect of this Court's decision in *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), by quoting a portion of a statement made in one of the footnotes and then misstating the effect and meaning of the remainder (see Appellees' Br., p. 63). The entire footnote is as follows (*Id.*, at 724, n. 22):

"22. If the federal authorities seek to deal with discrimination in hiring practices and their power to do so is upheld, that would raise questions not presented here. Compare *California v. Thompson*, 313 U.S. 109, 85 L ed 1219, 61 S Ct 930 (1941), with *California v. Zook*, 336 US 725, 93 L ed 1005, 69 S Ct 841 (1949)."

Both of the decisions to which the Court referred sustained California statutes as against a claim of Federal preemption. In *Zook* the California statute substantially duplicated a provision in the Federal Motor Carrier Act by prohibiting the sale or arrangement of any transportation over the public highways of the

regardless of the location in which the interstate carrier is operating.

"The Administrator is permitted to take into account special local considerations and waive the application of the preemption provision to assure that public health and welfare is protected. In addition, he may waive the application of preemption where local regulations are not in conflict with Federal regulations, as where local law requires lower speeds or different operating procedures, or modifications of routing."

State if the transporting carrier had no permit from the Interstate Commerce Commission (336 U.S. at 726-727). In *Thompson* the California statute required a license and bond of agents engaged in the business of selling transportation over the public highways of the State (313 U.S. at 111).

To put this matter in proper perspective, paraphrasing the Court's footnote in the terms and circumstances of this case would be helpful, namely: If the federal authorities seek to deal with airport proprietors "with respect to the permissible level of noise that can be created by aircraft using their airports"¹² and their power to do so is upheld, that would raise questions not presented here.

6. ***Braniff Airways v. Nebraska State Board.***

Braniff Airways v. Nebraska State Board, 347 U.S. 590 (1954), cannot be summarily dismissed as being "inapposite" (See Appellees' Br., p. 63). The Court in that case first made reference to a provision in the Air Commerce Act of 1926¹³ carried over in the Civil Aeronautics Act of 1938¹⁴ wherein "The United States is declared to possess and exercise complete and exclusive sovereignty in the air space above the United States . . ."¹⁵ and the further provision of the 1938

¹²34 Federal Register 18355-18356, Nov. 18, 1969, now 14 C.F.R. §36.5. See Appendix to Brief of Appellants, p. 3.

¹³44 Stat. 568, 572, §6.

¹⁴52 Stat. 973, 977, 1038, §1107(i)(3), 49 U.S.C. §176(a).

¹⁵Now §1108(a) Federal Aviation Act of 1958, 49 U.S.C. §1508(a).

Act¹⁶ which declared "a public right of freedom of transit" through the navigable air space.¹⁷ The Court then observed as follows (347 U.S. at 595-596):

"The provision pertinent to sovereignty over the navigable air space in the Air Commerce Act of 1926 was an assertion of exclusive national sovereignty. The convention between the United States and other nations respecting international civil aviation ratified August 6, 1946, 61 Stat 1180, accords. *The Act, however, did not expressly exclude the sovereign powers of the states.* HR Rep No. 572, 69th Cong. 1st Sess, p. 10. The Civil Aeronautics Act of 1938 gives no support to a different view. After the enactment of the Air Commerce Act, more than twenty states adopted the uniform Aeronautics Act. It had three provisions, indicating that the states did not consider their sovereignty affected by the National Act except to the extent that the states had ceded that sovereignty by constitutional grant. The recommendation of the National Conference of Commissioners on Uniform State Laws to the states to enact this Act was withdrawn in 1943. Where adopted, however, it continues in effect. See *United States v. Praylou* (CA4th SC) 208 F2d 291. Recognizing this 'exclusive national sovereignty' and right of freedom in air transit, this Court in *United States v. Causby*, 328 US 256, 261, 90 L ed 1206, 1210, 66 S Ct 1062, nevertheless held that the owner of land might recover for a taking by national use of navigable air space, resulting in destruction in whole or in part of the usefulness of the land property." (Italics added).

¹⁶52 Stat. 980, §3, 49 U.S.C. §403.

¹⁷Now §104, Federal Aviation Act of 1958, 49 U.S.C. §1304.

The relevance of this decision is underscored by the fact that Congress in enacting the Federal Aviation Act of 1958 and subsequent amendments "did not expressly exclude the sovereign powers of the states" and the provisions of the aviation Acts which the Court considered are now found in the Federal Aviation Act of 1958. One of these was inferentially relied upon by the Court of Appeals in reaching its decision in this case.¹⁸

7. Head v. New Mexico Board of Examiners.

Head v. New Mexico Board of Examiners, 374 U.S. 424 (1963), cannot be thrust aside as not being "analogous" (See Appellees' Br., pp. 63-64). This important case established four governing principles, each of which has a substantial bearing on the determination of the preemption issue. *First*, the validity of a claim of Federal preemption "cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation" (374 U.S. at 429). *Second*, the question to be decided is "whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State" (*Id.*). *Third*, the question "must be answered by a judgment on the particular case" (*Id.*). *Fourth*, a State statute "directly addressed to protection of the public health" (*Id.* 428), must be upheld as against a claim of Federal preemption "at least so long as any power the [Commission] may have remains 'dormant and unexercised' " (*Id.* 432). (Italics added).

¹⁸§104, Federal Aviation Act of 1958, 49 U.S.C. §1304, which declares "a public right of freedom of transit through the navigable airspace of the United States." See Opinion of the Court of Appeals, A. 427, footnote 12.

8. **Rice v. Chicago Board of Trade.**

Rice v. Chicago Board of Trade, 331 U.S. 247 (1947), is dismissed by the Appellees with the cryptic statement that "the Court merely determined that the Commodity Exchange Act . . . did not evidence a congressional intent to make its regulatory features exclusive in the area" (Appellees' Br., p. 64). Again, this important decision cannot be so summarily dismissed. All of the elements which Appellees claim to be decisive on the question of Federal preemption in this case were present there, as revealed by the following excerpts from the Court's opinion (331 U.S. at 250, 252):

"The Commodity Exchange Act provides comprehensive regulation of trading in futures on commodity exchanges which are designated as 'contract markets' by the Secretary of Agriculture. The Secretary is authorized to designate any board of trade as a contract market on its compliance with prescribed terms and conditions. §5, 7 USCA § 7, 2 FCA title 7, § 7. The Chicago Board of Trade has been so designated. The Act contemplates that each contract market will adopt rules governing transactions in futures contracts."

* * *

"The Secretary has promulgated numerous rules and regulations covering a variety of subjects pertaining to contract markets and their activities."

The Court additionally observed as follows (*Id.* 253):

"But there is not contained in the Commodity Exchange Act, as there is in the United States Warehouse Act, see *Rice v. Santa Fe Elevator Corp.* [331 US 218, ante, 1447, 67 S Ct 1146]

supra, a declaration by Congress that the system which it has adopted for the regulation of trading on contract markets is exclusive of state regulation."

Other relevant portions of the Court's opinion are set forth in our brief (p. 49). We would add to them the following statement, which appears in the footnote (331 U.S. at 254, n. 6):

"In the second place, Congress by granting the Board of Trade freedom to regulate within this narrow field has by that very act negated any inference that the Federal Government has preempted it by requirements of its own."

9. Effects of Jet Aircraft Noise Pollution.

Contrary to Appellees' suggestion (Appellees' Br., footnote, p. 68), the information which we have provided in our brief regarding the adverse effects of noise in general, and jet aircraft noise in particular, was not for the purpose of refuting the position taken by the Court of Appeals on the conflict issue. The information was included so that this Court would be fully apprised as to the seriousness of the problem¹⁹ and the need for immediate relief—relief which the Federal Aviation Administration has refused to provide. The effects of the severe noise pollution created by operations at the Hollywood-Burbank Airport are but a part of the picture. While the Port Authority of

¹⁹This Court is not unfamiliar with the effects of aircraft noise. *United States v. Causby*, 328 U.S. 256 (1946), and *Griggs v. Allegheny County*, 369 U.S. 84 (1962) provide graphic descriptions of the impact of aircraft noise prior to the dawn of the jet age. In *Causby* the residence was 2275 feet from the end of the runway and the barn which housed the chickens, 2220 feet (*Id.* 266). In *Griggs* the residence was 3,250 feet from the end of the runway (*Id.* 89).

New York and New Jersey takes great credit in its brief (p. 3, footnote 3) for having established noise limits on aircraft which may use its airports (112 PNdb), we find from the record in this case that the measurement is taken at the point nearest the runway *where there is a residence* (A. 300). It is small wonder that the governing bodies of Cedarhurst and Hempstead attempted to provide some relief for their residents.²⁰

There was of course no need to establish that the Burbank ordinance was reasonable and not unduly restrictive, not only because this issue was withdrawn from the District Court's consideration,²¹ but also because the very enactment of the ordinance furnished *prima facie* evidence of those facts and conditions which made the ordinance reasonable and necessary.²²

10. Southern Pacific Co. v. Arizona.

Appellees have liberally used *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), in an attempt to support their various contentions (Appellees' Br., pp. 71 *et seq.*). By taking statements in that case out of context they claim support for two propositions: (1) that because of the need for national uniformity, regulations such as the Burbank ordinance, if imposed at all, must be "prescribed by a single authority" at the national level (*Id.* 73-76), and (2) the ordinance

²⁰See *Allegheny Airlines Inc., v. Cedarhurst*, 238 F.2d 812 (2d Cir. 1956); *American Airlines, Inc. v. Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967) and 398 F.2d 369 (2d Cir. 1968).

²¹See A. 66-67 and Rp. Tr. 433-438.

²²A presumption of constitutionality attaches. *Alaska Packers Association v. Industrial Accident Commission*, 294 U.S. 532 (1935). Presumptions of law are proof. *Smith v. St. Louis & Southwestern Railway Company*, 181 U.S. 248 (1901).

must be tested "as if imposed on a nation-wide basis" (*Id.*, 77).

The decision supports neither of these propositions. As to the first proposition, what the Court said was this (325 U.S. at 770-771):

"Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference."

To be sure that there was no misunderstanding, this was reiterated further on in the opinion (*Id.* 775-776):

"The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journey which it interrupts."

There was of course no need in this case to "weigh" the effect of the Burbank ordinance, since the Ap

pellees made no showing that it burdened or interfered with interstate commerce in any respect. Beyond this, it is clear from the foregoing that had the majority of the Court been convinced (as the dissent was) that the Arizona statute would have achieved a significant reduction in accidents and casualties, it would have sustained the statute, even though the uniformity of the interstate train journey was affected.

The second proposition is likewise completely unsupported by this decision. The Court did not test the Arizona statute "as if imposed on a nation-wide basis". Obviously, if the train length provisions of that statute were imposed on a nation-wide basis the uniformity of the interstate journey would not have been affected at all. The only part the regulations of other States played in the Court's consideration was that if such other regulations did "not prescribe the same maximum limitations" on train lengths (325 U.S. at 775), it would be necessary to break up and reassemble trains to conform to these differing regulations as the train proceeded from State to State on its interstate journey. Nothing of even a remotely similar nature was involved in this case. The other decisions cited by the Appellees involved the same consideration (Appellees' Br., pp. 72, 77).²³ Appellees' argument was effectively put to

²³The Appellees also cite (at pp. 78-79) *Railroad Company v. Husen*, 95 U.S. 465 (1877). This case was distinguished, if not impliedly overruled, in *Smith v. St. Louis & Southwestern Railway Company*, 181 U.S. 248 (1901), where the Court sustained quarantine regulations established by the Governor of the State of Texas which prohibited the importation of cattle from the State of Louisiana for a certain period when anthrax was prevalent.

rest in *Head v. New Mexico Board of Examiners*, 374 U.S. 424 (1963).²⁴

Conclusion.

As evidenced by the *amicus* briefs which have been filed on behalf of the Appellees, almost all components of the air transportation industry are now represented: interstate air carriers (ATA); intrastate air carriers (PSA); major airports (Port Authority of New York and New Jersey); smaller airports (Lockheed); aircraft manufacturers (Lockheed);²⁵ business aircraft (NBAA) and airline pilots (ALPA). The depressing aspect of this opposition is that each seeks to promote its own selfish interests. Each wishes to be free of control. The Port Authority wants no interference with its right to exclude aircraft on the basis of noise in order to avoid or reduce money damage claims. The air carriers oppose the imposition of retrofit requirements because of the dollar cost. If Lockheed is any example, airport proprietors would prefer to use the property of others without paying for it. So would the airlines. The question therefore remains: Who will protect the People? In the absence of appropriate and effective Federal regulation, the answer must be: States, local governments and the Courts.

²⁴See Appellants' Br., pp. 63-64. *Southern Pacific Co. v. Arizona*, *supra*, 325 U.S. at 765-766, supports the rule enunciated in *Colorado Anti-Discrimination Commission*, *supra*, and *Head*, *supra*, that a State statute will be upheld as against a claim of Federal preemption "at least so long as any power the [Commission] may have remains 'dormant and unexercised'" (*Head*, 374 U.S. 424, at 432).

²⁵Lockheed Air Terminal, Inc., is a wholly owned subsidiary of Lockheed Aircraft Corporation (A. 99, 438).

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IN THE
Supreme Court of the United States
October Term, 1972

No. 71-1637

CITY OF BURBANK, et al.,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., et al.,

Appellees.

**APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**ANSWERING BRIEF OF THE PORT AUTHORITY
OF NEW YORK AND NEW JERSEY,
AS AMICUS CURIAE**

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Hearings before the Subcommittee on Transporta- tion and Aeronautics of the House Committee on Interstate and Foreign Commerce on H.R. 3400 and H.R. 14146, Aircraft Noise Abatement, 90th Cong., 1st and 2d Sess.	5,6
Hearings before the Aviation Subcommittee of the Senate Committee on Commerce, 90th Cong., 2d Sess.	9

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1637

CITY OF BURBANK, et al.,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., et al.,

Appellees.

**APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**ANSWERING BRIEF OF THE PORT AUTHORITY
OF NEW YORK AND NEW JERSEY,
AS AMICUS CURIAE**

The Port Authority of New York and New Jersey submits this brief in answer to that of the United States, appearing herein as *amicus curiae*. Regrettably, we must take sharp issue with the Government on the essential question of preemption. In our view the Government's position flies in the face of what is *demonstrably* Congress' unmistakable intent.

Argument

The heart of the Government's position is that the courts below erred in interpreting Congressional intent as preempting State and local police power regulation in the interest of aircraft noise abatement but not airport pro-

prior regulation. Instead, the Government alleges that Congress did not intend to preempt the exercise of State and local police power over aircraft noise abatement restrictions at airports within their jurisdiction, but only intended to preempt their regulation of the flight of aircraft in circumstances where they have no jurisdiction over the airports used by such aircraft. On this basis, the Government now contends, contrary to the position which the FAA took below, that the City of Burbank could regulate aircraft operations at the Hollywood-Burbank Airport which lies within the City's geographical boundaries.

The Government's position is that Congress, in enacting the 1968 and 1972 Noise Abatement Amendments to the Federal Aviation Act of 1958, wished to preserve the right of every State in the Union to exercise its police power in order to regulate the type of aircraft which could use airports within the State (other than airports owned by the Federal Government) as well the hours during which such aircraft could operate. The Government would have us believe that while Congress in 1968 was allegedly concerned "about efforts by communities adjoining airports to impose restrictions impinging upon Federal regulation of aircraft flight" (Brief, p. 46), it, *nevertheless*, acknowledged the right of a State to circumvent this admittedly preempted area through the exercise of its police power over airports. Presumably, under the Government's theory, a State can use its police power (or delegate that power to its political subdivisions) to achieve what it considers to be the proper balance between (a) the right of airport neighbors to a satisfactory noise environment and (b) the degree of air commerce desired.¹

¹ Many local governments own and operate airports which are physically located in whole or in part within the boundaries of other units of government. For example, the Morristown Airport in New Jersey, which is now operating subject to a court imposed curfew, is located in the Township of Hanover. See *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 A. 2d 692 (1969).

Since a State has jurisdiction over all privately and publicly owned airports within its boundaries, the Government has failed to explain what the Senate Committee and the Department of Transportation sought to achieve when they determined that after the passage of the 1968 Noise Abatement Amendment

"State . . . governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." Senate Report No. 1353, p. 6.

The fact is that both the Senate Committee Report and the Department of Transportation accepted Judge Dooling's reasoning in *American Airlines, et al., Port of New York Authority, et al. v. Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F. 2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969), that any regulation of aircraft noise (altitude restriction, noise limit or curfew) which denies aircraft the use of any portion of the navigable airspace is an attempt to control aircraft noise by regulating the flight of aircraft.

This is made crystal clear by the immediate contemporaneous construction which the FAA gave to the 1968 Amendment. In the preamble to its first regulation under the Amendment, the FAA specifically concluded that airport regulation of aircraft noise, of necessity, involves the regu-

New Haven's Tweed Airport is partially located in East Haven (clear zones and avigation easements). See *Town of East Haven v. Eastern Airlines, Inc.*, 331 F. Supp. 16 (D. Conn. 1971), supplementary opinion, 333 F. Supp. 338 (D. Conn. 1971), *aff'd*, ___ F. 2d ___ (2d Cir. 1972). Most county airports are located in other political subdivisions of the State which have jurisdiction over the airport for certain purposes. See *Town of Harrison v. County of Westchester*, 13 N.Y. 2d 258, 196 N.E. 2d 240 (1963). In addition, airports owned by Los Angeles, California, Philadelphia, Pennsylvania, Tulsa, Oklahoma, Toledo, Ohio, Phoenix, Arizona, Jackson, Mississippi, Orlando, Florida, San Francisco, California and Atlanta, Georgia are partially or wholly located outside the political jurisdiction of the public airport operator.

lation of aircraft flight. The preamble pointed out that the FAA:

"... does not recognize any right of any State or local government agency that is not an airport proprietor to issue any regulation *controlling the flight of aircraft for noise purposes*." 34 Federal Register 18356, Nov. 18, 1969. (Emphasis added.)

The Department of Transportation also equated airport noise regulation with airspace regulation in a legal opinion which it filed in 1971 with the Supreme Judicial Court of the Commonwealth of Massachusetts, urging the invalidity, on the grounds of Federal preemption and burden on commerce, of a proposed State law prohibiting the operation of certain noisy supersonic aircraft at airports within the Commonwealth.²

In that opinion, the Department of Transportation (together with the FAA) stated that the proposed law:

"In its practical effect . . . is an attempt by the legislature to regulate air traffic and airspace. It is no less an attempt at such regulation than a local ordinance purporting to regulate the altitude of flight (as in the *Audubon Park* case, *supra*, and the *Cedarhurst* case, *supra*.) or the permissible noise levels of aircraft (as in *Hempstead*, 398 F.2d 369). Indeed, Senate Bill No. 1161 constitutes the ultimate regulation. By banning supersonic transport takeoffs and landings, it completely forbids a certain type of air traffic and a certain use of airspace." Exhibit A attached hereto, p. 1a, 10a.

Moreover, the Department of Transportation used the legislative history of the 1968 Noise Abatement Amendment to support its contention that the proposed act was a regulation of the flight of aircraft which was preempted by the Federal Government. (Exhibit A, p. 11a.) The De-

² See *Opinion of the Justices*, _____ Mass. _____, 271 N.E. 2d 354 (1971).

partment pointed out, however, that the same legislative history:

"... recognized that State and local agencies as airport proprietors might limit the use of their airports on a nondiscriminatory basis." Exhibit A, p. 11a.

We respectfully submit that this earlier interpretation by the Department of Transportation of the legislative history of the 1968 Noise Abatement Amendment is the correct one.

The Government also argues that this Court should not give the legislative history of the 1968 Amendment its plain meaning because neither the Department of Transportation nor Congress focused upon the distinction between airport control in a proprietary capacity and airport control by means of the exercise of the police power. (Brief, p. 45.) This argument is contrary to the clear legislative record.

Both the oral and written statements of the appellee, Air Transport Association of America, submitted at the House Hearings on H.R. 3400 (the 1968 Noise Abatement Amendment) were directed to this distinction.³ The ATA statement, urging adoption of its substitute bill as well as its request for full Federal preemption of the aircraft noise field, stated that:

"To date, local attempts to regulate aircraft noise have been limited. Those which have rested on an asserted exercise of the police power have been uniformly held invalid, as an undue and unreasonable burden on interstate commerce or as invading an area uniquely committed to Federal care." House Hearings on H.R. 3400, p. 100. (Citations omitted.)

³ Hearings before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce on H.R. 3400 and H.R. 14146, Aircraft Noise Abatement, 90th Cong., 1st and 2d Sess., p. 91, 100-101.

The ATA statement went on to point out that:

"... the principal problem in attempted local regulation has not been by way of noise ordinances adopted under the police power, but purported 'lease conditions' imposed by the airport operator as landlord. For example, the Port of New York Authority's well-known '112-PNdb' rule is enforced against carriers operating at the New York airports, under the alleged right of the Port as operator of the airport to control the conditions of its use." *Id.*

After reviewing the cost to the airlines of complying with the Port Authority's jet terms and conditions, the ATA statement went on to emphasize the necessity for clear preemption covering Port Authority restriction because:

"Until now, the New York airport regulation has been upheld by the courts as not in conflict with any existing Federal certification or regulation." *Id.* (Citations omitted.)

The letter from the Department of Transportation to the Chairman of the Committee on Interstate and Foreign Commerce, dated March 1, 1968 (House Hearing pp. 8-10) was specifically directed to the ATA's request that the airport proprietors' restrictions be preempted. In that letter (a copy of which is attached to the Government's brief as Appendix B) ⁴ the Department of Transportation not only directed itself to the right of the airport operator to limit aircraft noise in the exercise of its proprietary functions, but also recommended that such authority continue. The letter states:

⁴ The copy of the Department of Transportation letter of March 1, 1968, addressed to the Chairman of the House Committee on Interstate and Foreign Commerce is reprinted in the Hearings held by that Committee's Subcommittee on Transportation and Aeronautics on H.R. 3400 at pp. 8-10 (See footnote 3). The copy of the letter set forth in the Government's brief as Appendix B is addressed to the Chairman of the House Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce.

"As a practical matter, and as ATA concedes in its testimony, the only regulatory authority left to local communities or airport operators is the authority of the airport operator, *in the exercise of its proprietary function*, to limit on noise grounds the kind of aircraft which may use its facility. The Department is firmly convinced that such authority in the airport operator should continue." House Hearings on H.R. 3400, p. 9; Appendix B to Government's Brief, p. 67. (Emphasis added.)

Moreover, Judge Dooling's opinion in the *Hempstead* case, 272 F. Supp. 226, 233-34, which the Secretary and Senate Committee used to define the nature and scope of Federal preemption in the aircraft noise field, also deals with the legal difference between a local police power enactment such as the Hempstead ordinance and a landlord's restriction on aircraft users such as the Port Authority's noise limits and nighttime runway limitations.

Finally, the distinction between police power and an airport operator's regulations was fully explored at the so-called Harris Committee Hearings held in 1959-62 before the Subcommittees of the Committee on Commerce, House of Representatives, 86th and 87th Congress. At these hearings, my predecessor, in discussing the Port Authority's jet noise restrictions, advised that the legal basis for such restrictions was the:

"... power [that] inheres in the very nature of the property ownership and control and unless surrendered by contract is possessed by all owners or operators of real property." Hearings, p. 657.

He further explained that the assertion of the Port Authority's power to restrict the use of its airports for noise abatement purposes:

"... was not an assertion ... of any legislative power. It was a common-law right which inheres to the owner and operator of land." *Id.*

The Senate Committee on Commerce was fully aware that the Harris Committee Hearings had been held and

indeed referred to them in its Report on H.R. 3400. (Report No. 1353, p. 2.) Furthermore, it must be assumed that when the Secretary of Transportation, Alan S. Boyd, wrote to the Chairman of the Subcommittee on Aviation of the Senate Committee on Commerce on June 22, 1968, defining the nature of Federal preemption in the aircraft noise field, he did so with full knowledge of the meaning of the terms in question. As a matter of fact, the Secretary himself participated in the Harris Committee Hearings. (Hearings, pp. 496-540.)

Although the Harris Committee Hearings and Report are useful in determining the knowledge possessed by the Secretary of Transportation and the Senate Committee when they explored the question of Federal preemption in the aircraft noise field, the Government is wrong (Brief, p. 24-30) in using this material to shed light on the interpretation of the Federal Aviation Act of 1958, since no legislative action had been taken thereon. Judge Dooling's well-reasoned conclusion on this point in *Hempstead* is irrefutable. 272 F. Supp. 226, 234.

The Government is also in error in asserting that Congress enacted the Noise Control Act of 1972 upon the assumption that local police power curfews at airports had not been preempted (Brief, p. 41). On the contrary, it must be presumed that Congress acted not only with knowledge of the uniform contemporaneous construction that such police power regulations had been preempted (Port Authority principal brief, p. 16), but also with knowledge that both the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit had invalidated the Burbank nighttime curfew on the ground of preemption and that the FAA had urged such a holding.⁵

⁵ Congress also enacted the Noise Control Act of 1972 with knowledge of the opinion rendered in *Opinion of the Justices*, Mass. _____, 271 N.E. 2d 354 (1971), in which the Court held that a proposed police power statute barring the operation of noisy supersonic aircraft at Massachusetts airports was invalid

Conclusion

In light of the reasons set forth both here as well as in our principal brief, we respectfully submit that the decision below should be affirmed.

Respectfully submitted,

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under the Supremacy Clause. Although the Court questioned, by way of *dictum*, the right of an airport proprietor to ban the supersonic aircraft from its airport, we submit that this observation stemmed from the fact that the DOT-FAA brief failed to advise the Court that the FAA's Advanced Notice of Proposed Rule Making (ANPRM) on civil supersonic aircraft noise type certification standards, published August 6, 1970, specifically recognized the authority of the airport proprietor to regulate supersonic aircraft. 35 Fed. Reg. 12555-56, see Port Authority principal brief, pp. 14-15.

The ANPRM on civil supersonic aircraft noise standards reflects the Congressional determination that uniformity in the aircraft noise field is neither necessary nor desirable and that an airport proprietor's restrictions in this area would in fact aid the growth of air commerce. Hearing before the Aviation Subcommittee of the Senate Committee on Commerce, 90th Cong., 2d Sess., pp. 24-28, 34-39. Such a determination by Congress pursuant to its commerce clause powers has always been respected by this Court. *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421 (1856); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946); See also *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945).

Proof of Service

I, PATRICK J. FALVEY, a member of the Bar of the Supreme Court of the United States, and General Counsel of The Port Authority of New York and New Jersey, appearing herein, *Amicus Curiae*, hereby certify that on the 30th day of January, 1973, I served copies of the foregoing brief on counsel for Appellants, counsel for Appellees, counsel for the State of California, *Amicus Curiae*, counsel for the United States, *Amicus Curiae*, counsel for the National Business Aircraft Association, Inc., *Amicus Curiae*, and counsel for the Air Line Pilots Association, International, *Amicus Curiae*, by mailing three copies thereof in a duly addressed envelope, with air mail postage prepaid, to each of the following in this cause:

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EXHIBIT A**SUPREME JUDICIAL COURT****COMMONWEALTH OF MASSACHUSETTS**

In the Matter of Senate Bill No. 1161 (as amended) Pending
Before the House of Representatives of the Common-
wealth of Massachusetts

**OPINION OF
THE DEPARTMENT OF TRANSPORTATION
AND
THE FEDERAL AVIATION ADMINISTRATION**

Pursuant to leave of the Court, the General Counsel of the Department of Transportation and the General Counsel of the Federal Aviation Administration submit the following legal opinion.

The House of Representatives of the Commonwealth of Massachusetts by Order No. 5382 dated 20 April 1971 has requested the opinion of the Honorable Justices of this Court upon the question of the constitutionality of Senate Bill No. 1161 (amended) if enacted into law.

The Journal of the House for Tuesday, 20 April 1971, contains the amended language of Senate Bill 1161, "An Act prohibiting supersonic transport planes from landing or taking off in the Commonwealth," which reads:

"Notwithstanding the provision of any law, unless there is an emergency, no commercial supersonic transport plane which is not capable of limiting its noise level to one hundred and eight decibels or less while landing, on the ground, or taking off, will be permitted to land or take off in the commonwealth."

The Court by Announcement dated 30 April 1971 invited the filing of briefs by interested persons.

This opinion urges this Court to find in its Advisory Opinion concerning the question of law presented by the House of Representatives that the Commonwealth of Massachusetts is not constitutionally competent to enact any law which regulates or prohibits the operation of supersonic aircraft at airports within the Commonwealth of Massachusetts, for the reasons that the Federal Government has preempted the regulation of airspace and aircraft operations, and because the Commerce Clause of the United States Constitution requires that air commerce be regulated by a single authority, the Congress of the United States.

I. THE FEDERAL GOVERNMENT HAS SO PREEMPTED THE REGULATION OF AIRSPACE AND AIRCRAFT OPERATIONS AS TO PRECLUDE ENFORCEMENT OF SENATE BILL NO. 1161.

A. THE FEDERAL SCHEME IS COMPREHENSIVE AND PERVASIVE.

Through a series of enactments and regulations, the federal government has asserted a broad authority to control and regulate use of the navigable airspace and aircraft operations. The principal statute is the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542, as amended.

1. *The Federal Aviation Act of 1958.* Under this Act, the United States is declared "to possess and exercise complete and exclusive national sovereignty in the airspace of the United States." (49 U.S.C. § 1508(a)) Each citizen of the United States is granted the "right of freedom of transit through the navigable airspace of the United States." (49 U.S.C. § 1304) "Navigable airspace" is defined in the Act as all airspace "above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." (49 U.S.C. § 1301 (24))

To facilitate transit through the air in a safe and efficient manner, the Act established the Federal Aviation Administration (FAA), headed by an Administrator, and conferred upon that agency broad powers to regulate air commerce in the "public interest." (49 U.S.C. §§ 1303, 1341(a), 1348) Matters enumerated by the Act as being part of the "public interest," include "the regulation of air commerce . . . to best promote its development and safety and fulfill the requirements of national defense"; "the control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of safety and efficiency"; "the development and operation of a common system of air traffic control and navigation for both military and civil aircraft." (49 U.S.C. § 1303)

In order to fulfill the broad mandate of the Act, the Act confers upon the Administrator of the FAA equally broad powers over all aspects of the navigation of aircraft. Thus the Administrator is authorized, among other things, to develop plans and formulate policy with respect to the use of navigable airspace and allot the use of such airspace as he deems proper (49 U.S.C. § 1348 (a)); prescribe rules governing the flight of aircraft, including rules for the efficient and safe use of navigable airspace as well as "for the protection of persons and property on the ground." (49 U.S.C. § 1348(c)); promote air commerce by establishing and maintaining air navigation facilities (49 U.S.C. § 1303(d), 1348(b)); conduct tests and undertake research and development of aircraft and aircraft equipment (49 U.S.C. § 1353(b)); and prescribe certain types of equipment aircraft must utilize (49 U.S.C. § 1423(a) (1)).¹ In

¹ Scheduled airlines in addition to regulation by the FAA are also subject to regulation by the Civil Aeronautics Board. (C.A.B.). Thus, before an air carrier may engage in air transportation and be subject to operational and navigation regulation by the FAA, the airline must secure a certificate from the C.A.B. permitting it to engage in air transportation. (49 U.S.C. § 1371).

addition to these express enumerated powers, the Administrator is given the authority generally to issue such orders, rules and regulations as he deems necessary to execute his duties and carry out the provisions of the Act (49 U.S.C. § 1354(a))

2. *The 1968 Amendment.* Among the most important amendments to the Federal Aviation Act is that added by Public Law 90-411, 82 Stat. 395 (1968) pertaining to aircraft noise and sonic boom. (49 U.S.C. § 1431) Under the amendment, the Administrator is required to prescribe such standards, rules, and regulations as he may find necessary for the control and abatement of aircraft noise. In so doing, the Administrator must consider *inter alia* whether any proposed standard, rule or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest and whether it is economically reasonable and technologically practical and appropriate for the type of aircraft to which it will apply.

3. *Regulations under the Act.* Pursuant to his broad authority, the Administrator has issued numerous complex and detailed rules and regulations governing air navigation. See Title 14, Code of Federal Regulations, especially Parts 71, 73, 75, 77, 91, 93, 95, 97. As part of the regulatory scheme established by the FAA to assure the orderly flow of air traffic, the Administrator has divided the navigable airspace above the United States into various "control areas" and "control zones." (14 C.F.R. 1.1, 71.7, 71.11) Each of the designated control areas and zones has been assigned a different use. For example, the airspace from the surface up to 2,000 feet above the surface within a horizontal radius of five statute miles from the geographical center of any airport having a control tower, is designated "airport traffic area" and is reserved exclusively for the takeoff and landing of aircraft at the airport. (14 C.F.R. 1.1, 91.85(b)) Other examples of designated

airspace include "jet routes" which are located between 18,000 feet and 45,000 feet above mean sea level and "federal airways," each eight miles wide and located between 700 feet above the surface of the earth to 18,000 feet above mean sea level (14 C.F.R. 75.1, 75.11, 71.3, 71.5).

All aircraft operating within the navigable airspace must comply with the general operating and flight rules of the FAA (14 C.F.R. 91). At airports with control towers operated by the United States, such as the Logan International Airport at Boston, all operations to, from, or on the airport are regulated by the FAA in an effort to maintain traffic separation and avoid collision. Landings and departures, which are permitted only after clearance is obtained from FAA personnel, are made pursuant to procedures and regulations of the FAA which prescribe in detail such items as route of the aircraft approaching or leaving the airport, its angle of flight, altitude at any given point, speed, and the runway the aircraft may use. (e.g., 14 C.F.R. 91.79; 91.85; 91.87; 91.116; 91.117; 91.119; 91.121; 97.1) Standard instrument approach procedures for airports, such as Logan International, are published as regulations by the FAA and are available to each pilot in the form of charts. (14 C.F.R. 97) Standard Instrument Departure Procedures established by the FAA for Logan International Airport are published by the Coast and Geodetic Survey and when incorporated in a departure clearance issued by the Tower must be complied with by the pilot. (14 C.F.R. 91.87(h)). Logan International Airport has a runway noise abatement system (14 C.F.R. 91.87 (g)), and procedures have been established by the Tower designed to reduce the community exposure to noise to the lowest practicable minimum. Although the Logan International noise abatement procedures are not mandatory on the part of pilots they are followed by FAA controllers in regard to the issuance of clearance to all large (over 12,500 pounds) aircraft and all turbine powered aircraft.

To assure no deviation from FAA procedures and regulations, all pilots operating within an airport traffic area are required to maintain two-way radio communications with the control tower and to comply with all clearances issued by the control tower. (14 C.F.R. 91.75(a), (b); 91.87(b), (h)) Air traffic outside of the airport traffic area is similarly regulated by the FAA to maintain proper aircraft separation, with the FAA having the authority to set route and altitude restrictions for aircraft operating between airports. (See e.g., 14 C.F.R. 71.1, 75.1, 91.79, 91.81, 91.119(a), (1.121(a), 91.123(a), (b), 95.1)

Although as a general rule a pilot must follow all the regulations, procedures and instructions of the FAA, the FAA recognizes that the primary responsibility and authority for the safe operations during flight time of an aircraft rests with the pilot in command. (14 C.F.R. 91.3(a), 121.533(e), 121.535(d), 121.537(d)) Accordingly, a pilot in command is expressly authorized to deviate from certain of the general operating and flight rules to the extent necessary for the safety of the operation. (14 C.F.R. 91.3(b)) This placing of primary responsibility for safe operation upon the pilot in command is consistent with the long standing practice in aviation for the safety of its operation and in recognition of the fact that final decisions must be made whenever possible by the pilot.

The Administrator has promulgated aircraft type certification regulations in accordance with his responsibilities in the field of noise control and abatement. (14 C.F.R. 21, 36, 34 F.R. 18355-18379) and under the authority of Public Law 90-411, *supra*. On 10 April 1970, the Administrator issued a Notice of Proposed Rule Making to adopt a new Federal Aviation Regulation 91.55 in regard to sonic boom by civil aircraft. (35 F.R. 6189, April 16, 1970) Under consideration at the present time are proposed regulatory actions (Advance Notice of Proposed Rule Making, 35 F.R. 16980, 4 November 1970) relating to the retro-

fitting of subsonic transport and turbojet powered aircraft for the purpose of reducing noise at the source. Further, FAA studies are continuing in regard to the changing of operating procedures for present day subsonic transport and turbojet powered aircraft to reduce to an absolute minimum the noise effect without retrofit.

4. *National Environmental Policy Act of 1969*, Public Law 91-190, 83 Stat. 852, approved January 1, 1970, states that it is national policy to encourage productive and enjoyable harmony between man and his environment. To this end Congress declared it is the continuing policy of the Federal Government in cooperation with State and local governments and others, to use all practicable means "to foster and promote the general welfare, to create and maintain conditions under which man and nature exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. Accordingly, all agencies of the Federal Government are required under the Act to review all their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies which prohibit full compliance with the national policy expressed by Congress and to report to the President by July 1, 1971.

5. *Airport and Airway Development Act of 1970*. The Congress exercised further authority in the field of aviation by the enactment of Public Law 91-258, 84 Stat. 219 (May 21, 1970). Title I of that Act, the "Airport and Airway Development Act of 1970," authorizes the Secretary of Transportation to make grants of \$840 million for public airport development over a four-year period (§ 14b). This Title also requires airports which serve air carriers certificated by the C.A.B. to obtain an airport operating certificate from the Administrator (§ 612). Such cer-

tificates can be issued only after a finding by the Administrator that the Airport is "properly and adequately equipped and able to conduct a safe operation." Title II of the new Act provides for new or increased taxes to be imposed on virtually all users of the airport and airway system. These taxes would be placed in an "Airport and Airways Trust Fund" to be expended under the Act for airport planning, airport development and airways facilities in accordance with a National Airport System Plan to be prepared by the Secretary of Transportation.

B. ENACTMENT OF SENATE BILL 1161 WOULD BE INVALID BECAUSE IT SEEKS TO REGULATE A FIELD PREEMPTED BY CONGRESS.

Congress, through the enactment of comprehensive legislation indicating an intention to "occupy . . . the field," may "preempt" the field to the exclusion of local regulation. *Hines v. Davidowitz*, 312 U.S. 52, 67; *Pennsylvania v. Nelson*, 350 U.S. 497, 502. The principle of preemption is fully applicable to the area of regulation of interstate commerce. See, e.g., *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767; *Campbell v. Hussey*, 368 U.S. 297.

The Supreme Court has advanced three tests for determining whether the federal government has preempted an area: (1) whether the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it; (2) whether federal regulation "touch a field" in which the federal interest is dominant in the federal system; and (3) whether the enforcement of local enactments on the same subject may produce a result inconsistent with the objective of federal law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230. See also *Pennsylvania v. Nelson*, *supra*, at 502-502. Each of these tests is clearly satisfied in this instance.

First, the scheme of federal regulation of air commerce is "comprehensive" and "extensive." *Chicago and Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 105; *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303. The broad scope of federal regulation of the use of airspace and of air traffic is readily apparent from the statutes and regulations quoted above. The extent of this regulation is such that Congress could not have anticipated that states or cities would step in and try to exercise their own brand of regulation.

Second, the federal legislation regulates an area in which the federal interest is dominant. The Constitution, Article I, section 8, confers upon Congress the exclusive power to regulate interstate and foreign commerce. It is the federal government that is charged with responsibility of assuring the free flow of commerce by establishing uniform procedures prescribed by a single authority for the safe and efficient use of navigable airspace. See *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292; cf., *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 766-67. Senate Bill No. 1161 purports to regulate air traffic and use of airspace and therefore has a direct impact upon interstate and foreign commerce which is the concern of the national government. Since "exclusive federal regulation in order to achieve uniformity vital to the national interest" is required, local legislation must give way to the overriding federal interest in this area with regard to air commerce. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144.

The third test of preemption is met here in that local regulation in the field in which the legislature seeks to legislate necessarily produces a result inconsistent with the objectives of federal legislation. In enacting the Federal Aviation Act, it was the intention of Congress to establish the right of every citizen to freedom of transit through the

navigable airspace of the United States and to facilitate the exercise of that right by a federal regulatory scheme which promotes safe and efficient air commerce. The enactment of an ordinance or law by a local government that has the effect of prohibiting airplanes from using navigable airspace obviously is inconsistent with the objectives of federal law. Accordingly, local legislation with objectives different than those Congress has sought to achieve must yield.

The conclusion that Senate Bill No. 1161 purports to regulate an area preempted by legislation of the national government finds support in prior decisions holding that the federal government has preempted the area of regulation of air traffic and use of airspace. See *American Airlines, Inc. v. City of Audubon Park*, 297 F. Supp. 207 (W.D. Ky. 1968), aff'd, 407 F. 2d 1307 (6th [sic] Cir. 1969); *American Airlines, Inc. v. Town of Hempstead*, 272 S. [sic] Supp. 226, 232-33 (E.D. N.Y. 1967), affirmed without reaching preemption issue, 398 F. 2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969); *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 238 F. 2d 812, 814-15 (2d Cir. 1956).

In its practical effect, Senate Bill No. 1161 is an attempt by the legislature to regulate air traffic and airspace. It is no less an attempt at such regulation than a local ordinance purporting to regulate the altitude of flight (as in the *Audubon Park* case, *supra*, and the *Cedarhurst* case, *supra*.) or the permissible noise levels of aircraft (as in *Hempstead*, 398 F. 2d 369). Indeed, Senate Bill No. 1161 constitutes the ultimate regulation. By banning supersonic transport takeoffs and landings, it completely forbids a certain type of air traffic and a certain use of airspace.

Recent congressional action shows an intent to further preempt the field of regulating airspace and airports. As pointed out above, Congress in 1968, amended the Fed-

eral Aviation Act of 1958, to charge the Administrator of the FAA with responsibility for the issuance of rules necessary to provide for the control and abatement of aircraft noise. (Public Law 90-411, July 21, 1968) In doing so Congress recognized that local governments had a continuing responsibility not affected by Public Law 90-411, to assure compatible land use through the exercise of land use planning and zoning powers as a necessary part of the total attack on aircraft noise (Senate Report No. 1353, July 1, 1968, U.S. Code Cong. and Adm. News (1968), 2474, 2484). The Report concurred in the views expressed by the then Secretary of Transportation in a letter to the committee dated June 22, 1968, that "H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." The same letter recognized that State and local agencies as airport proprietors might limit the use of their airports on a nondiscriminatory basis. Moreover, the new "Airport and Airway Development Act of 1970" (Public Law 91-258, July 1, 1970), summarized above, is even more comprehensive than the Federal Airport Act of 1946. These recent statutes should remove any doubt which may have existed as to federal preemption of regulation of air traffic or use of airspace.

In sum, Senate Bill No. 1161 cannot stand because it results in a regulation of the use of airspace and of air traffic. Since the federal government "has taken the particular subject in hand," the Commonwealth is precluded from enforcing its legislation. *Charleston & W. C. Ry. v. Varnville Furniture Co.*, 237 U.S. 597, 604. This result follows "however commendable . . . different" the purpose of the local regulation. *Napier v. Atlantic Coast Line R.*, 272 U.S. 605, 613.

II. SENATE BILL NO. 1161 IS INVALID BECAUSE THE COMMERCE CLAUSE REQUIRES THAT AIR COMMERCE BE REGULATED BY A SINGLE AUTHORITY.

In the foregoing section, we have demonstrated that the comprehensive nature of the federal legislation in regulating air traffic and the use of navigable airspace has preempted this field for the national government to the exclusion of local governments. We now show that even if the federal legislation did not preempt that area, Senate Bill No. 1161 would still be invalid as the Constitution itself confers upon Congress the exclusive power to regulate such commerce.

It is settled that the Commerce Clause of the Constitution affords protection from state legislation inimical to national commerce, even in the absence of congressional action. *Southern Pacific Co. v. Arizona*, 327 U.S. 761, 769. Ever since *Gibbons v. Ogden*, 9 Wheat 1, the states have not been deemed to have authority to . . . "regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Id.* at 767.

A local ordinance or regulation seeking to impose supersonic transport prohibition is a vivid illustration of the need to have regulation of airspace and air traffic under a single authority. Such regulation cannot be considered solely "in the accident of its particular circumstances." *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 266, 231-232 (E.D. N.Y. 1967), for, if upheld, it would likely spread to other major airports and the inevitable result would be to hobble the supersonic aircraft as an instrument of national and world transportation.

Air transportation, perhaps more than any form of commerce, requires regulation by a single authority. Even before 600-mile per hour flights became the custom, Congress recognized this need by the establishment of the

Federal Aviation Agency. It would indeed be a harmful and regressive step to permit a compromise of the FAA's authority through permitting the enforcement of local laws or regulations regarding the use of navigable airspace.

CONCLUSION

Senate Bill No. 1161, the Act now pending in the Legislature of the Commonwealth of Massachusetts, is invalid since it attempts to regulate in a field preempted by Congress and because the Commerce Clause of the Constitution requires that air commerce be regulated by a single authority, the Congress of the United States. Its effect would be to place a burden on interstate and foreign commerce, by prohibiting the operation of a certain aircraft type at at least one major interstate and international air terminal, which terminal (Logan International Airport) is a vital part of the National Airport System. A proliferation of this type of local regulation could eventually stagnate and destroy the national air transportation system. Senate Bill No. 1161 is therefore repugnant to the Federal Aviation Act of 1958 and the Airport and Airways Development Act of 1970, and they cannot be reconciled.

Respectfully submitted:

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1637

THE CITY OF BURBANK, et al.,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., et al.,

Appellees.

On Appeal From the United States Court of Appeals
for the Ninth Circuit

**SUPPLEMENTAL BRIEF OF THE APPELLEES
IN RESPONSE TO THE BRIEF FOR
THE UNITED STATES AS AMICUS CURIAE**

On January 11, 1973, four days before this case had been scheduled for oral argument, the Solicitor General filed a brief for the United States as *amicus curiae* supporting appellant, the City of Burbank. Noting that the Federal Aviation Administration had supported the appellees in both courts below, the Solicitor General said that the reversal of position contained in the brief "reflects the views of the Department of Transportation, of which the FAA is a constituent agency" (Br. 4).

This Court, having been informed a few days earlier of the Solicitor General's intention, postponed argument until February 20, 1973. The postponement has enabled appellees to file this supplemental brief in response to the *amicus curiae* brief for the United States.

SUMMARY OF ARGUMENT

I. Airspace Management

A. Although the brief for the United States reverses the position taken by the Federal Aviation Administration in the courts below, it nevertheless recognizes that "airspace management" is an exclusively federal responsibility (Br. 8, 12). Airspace management is a comprehensive concept which includes regulation of the air traffic flow from the surface of air carrier airports such as Hollywood-Burbank into the navigable airspace. If the federal government is to be an effective airspace manager, it seems inescapable that it must be able to utilize the airspace 24 hours a day without the handicap of severe and cumulatively debilitating restrictions imposed by local governments. While appellees do not contend that all airports must be treated alike or that curfews are never appropriate, we urge that restrictions so crucial to the system must come from the agency entrusted by Congress with all aspects of airspace management, the Federal Aviation Administration.

Congestion with its attendant threat to safety and efficiency stands out as a major problem for the nation's air transportation system. A substantial limitation on the hours during which aircraft operations are permitted will result in increased congestion during the remaining hours. Moreover, curfews compromise airspace management by acting as a blockade on traffic flow, which extends beyond the hours of the ban and affects all terminals with connections to the restricted airport. Under the Federal Aviation Act, a restriction on the national air transportation system having such adverse consequences should be imposed, if at all, by a centralized authority able to weigh the multiple national interests involved and to make adjustments necessary to keep the system operating efficiently.

B. Twice within the last five years, Congress has deliberately reaffirmed its decision, initially taken in 1958, to place the Government's regulatory authority over aircraft noise in the FAA rather than some other agency. Act of July 21, 1968, Pub. L. No. 90-411, 82 Stat. 395; Noise Control Act of 1972, Pub. L. No. 92-574, §7, 86 Stat. 1239. Thus there is special significance to the *amicus curiae* briefs filed on behalf of the FAA in each of the lower courts. These briefs express the responsible federal agency's conviction that local curfew ordinances would aggravate congestion, interfere with efficient airspace management, and thwart the intention of Congress.

In addition, the FAA has publicly opposed the imposition of curfews on commercial jet operations from the beginning of the jet age in 1959 to the present time. This long standing opposition to local restrictions on the use of navigable airspace demonstrates the inaccuracy of the Government's contention (Br. 52) that any rejection by the FAA of night curfews as a noise abatement measure would have represented "a major change in federal policy."

II. Preemption

The brief for the United States founders upon the fundamental misstatement of three key elements of the legislative history of the Federal Aviation Act.

A. The Government erroneously asserts that the regulation of aircraft noise was not the subject of any congressional enactment prior to 1968 (Br. 23-24). The legislative history demonstrates conclusively that the FAA's broad authority to make regulations "for the protection of persons and property on the ground" was written into the 1958 Act as a direct result of congressional concern with aircraft noise in the vicinity of the nation's airports.

B. Under the 1958 Act, Congress intended to vest authority for all aspects of airspace management once and for all in the Administrator of the FAA. To permit a local entity with "any jurisdictional tie" to an airport to disallocate airspace by imposing a night curfew, as urged by the United States (Br. 46), would fractionalize the authority for airspace management in direct opposition to the congressional purpose.

C. The brief for the United States incorrectly asserts that the legislative history has not focused on the distinction between airport control by a proprietor and airport control through the exercise of police power (Br. 45). It was precisely this distinction that was advanced by the Secretary of Transportation and concurred in by the Senate Commerce Committee in 1968. While preserving certain rights for airport proprietors, the Committee said that "State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." S. REP. NO. 1353, 90th Cong., 2d Sess. 6 (1968). The Government has taken a "selective" view of the legislative history which ignores this declaration of congressional intent, attempts to characterize the proprietary-police power distinction as an invention of the court of appeals, and then argues that the distinction is not valid (Br. 36 n.27, 44-48). This constitutes a transparent attempt to rewrite legislative history and thereby to thwart the explicit intention of Congress.

The Government argues that the proprietary-police power distinction would lead to the "bizarre result" of a federal preemption policy that applies only to private airports (U.S. Br. 45-46). This argument assumes that Congress intended to preempt police power regulation only in the rare situation where the airport is not owned by a local governmental entity. Viewed correctly, however, the federal preemption intended by Congress applies nation-

wide to all airports irrespective of the character of their ownership and bars any purported exercise of police power. Many of the nation's airports are physically located entirely or partially within the boundaries of a governmental unit other than the entity which operates the airport. To allow police power regulation of aircraft noise by local entities with any jurisdictional tie to an airport would be to invite chaos in the national air transportation system.

III. Conflict

The Order issued by the FAA Chief of the Air Traffic Control Tower at Hollywood-Burbank stated that the preferential runway procedures outlined therein "are designed to reduce the community exposure to noise to the lowest practicable minimum" (A. 412). The court of appeals held that this "assertion represents a considered determination that measures of the magnitude of that taken by the City of Burbank are beneath 'the lowest practicable minimum'" and are thus in conflict with federal law (A. 426).

Since the United States recognizes that the FAA has authority to "reject" the imposition of a curfew (Br. 52 n.45), it is reduced to arguing that the FAA Order must mean something different from what it says, different from the interpretation placed on it by the FAA in its *amicus* briefs below, and different from what each of the lower courts found and held the Order to say and mean. Thus, the Government contends without supporting authority that the FAA Order "simply did not" represent any consideration and rejection of a locally imposed night curfew (Br. 51). This is a pure assumption which is refuted by the language and logic of the Order and by the demonstrated instances of FAA opposition to nighttime curfew restrictions over a period of two decades.

IV. Commerce Clause

The cursory treatment of the Commerce Clause issues in the brief for the United States fails to address at all our contention (and the district court's holding (A. 368, 406)) that the Burbank ordinance is invalid under the second test of *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945), because it purports to operate in an area where regulation should be prescribed by a single authority. The Department of Transportation has previously indicated, however, that it is in complete agreement with our position that air transportation requires regulation by a single authority and that the FAA's authority should not be compromised by permitting the enforcement of local laws or regulations regarding the use of the navigable airspace. *See* Appendix A to Answering Brief of the Port Authority of New York and New Jersey.

The Government's brief asserts without citation (Br. 56) that although an approach evaluating the nationwide effect of curfews "might be appropriate in some cases, we believe it is not correct in the present case." This statement ignores the settled course of decision in this Court that the local regulation should not be regarded as an isolated phenomenon but should be weighed and tested as if similar restrictions were adopted throughout the United States (*see* Appellees' Br. 72, 77). Evaluated on this basis, night curfews on aircraft operations would cause massive disruption in the national air transport system, constituting an unreasonable burden on interstate commerce (F.F. 61-84, A. 394-401).

ARGUMENT

I. FEDERAL AIRSPACE MANAGEMENT REQUIRES CONTROL OF THE HOURS DURING WHICH AIRCRAFT MAY ENTER THE NAVIGABLE AIRSPACE.

The brief for the United States recognizes that "airspace management" is an exclusively federal responsibility. Thus, the brief states:

"Among the areas in which there appears to be a clear federal preemption of State regulation are the following: . . . airspace management, . . . committed to exclusive federal regulation through the Federal Aviation Administration (FAA)." (Br. 8.)

Again, the United States' brief asserts:

"That there is a very substantial segment of air commerce, *including all aspects of airspace management*, flight navigation, and safety, from which the States are excluded from the exercise of any regulatory power by federal preemption is scarcely subject to dispute. . . ." (Br. 12; emphasis added.)

The position advanced by the United States cannot survive this concession. As we shall show, "airspace management" is a comprehensive concept which includes management of the hours during which aircraft can enter the navigable airspace at Hollywood-Burbank and comparable air carrier airports in the national air transportation system. Once it is recognized that airspace management is an exclusively federal responsibility, it is plain that there is no room for local governmental units such as the City of Burbank unilaterally to deny jet aircraft access to the navigable airspace for one-third of each day at an airport which serves more than one million passengers each year (F.F. 20, A. 381). Restrictions so crucial to the system must come, if at all, from a centralized authority

entrusted by Congress with all aspects of airspace management.*

A. Regulation of the Hours of Aircraft Operations Is a Critical Aspect of Federal Airspace Management.

If the federal government is to be an effective manager of the nation's navigable airspace, it seems inescapable that it must be able to utilize the airspace 24 hours a day without the handicap of severe and cumulatively debilitating restrictions imposed by local governments. This is demonstrated by the record in this case, by the positions taken by the responsible federal agencies, and by the clear purpose of Congress.

Congestion, with attendant threat to safety and efficiency, stands out as a major problem for the nation's air transportation system even under present circumstances where operations can be spread over 24 hours. At the trial, Benjamin Freiman, Chief of the Air Route Traffic Control Center for the Southern California area, described the air traffic situation in the Los Angeles Basin as being "quite congested," with "major congestion" occurring between 6:00 p.m. and 9:30 p.m. (A. 192). When the airspace is congested, Freiman testified, "we are making use of all available airspace at that particular time" (A. 193).

The Third Annual Report of the Secretary of Transportation to the President and Congress for Fiscal Year

* We do not contend, as the United States implies (Br. 9, 56), that there must be "uniform national treatment" in which all airports would be "treated alike" as to night curfews. We recognize that different airports may require different treatment. We contend, however, that such decisions should be made by a national agency, able to assess nationwide information and the multiple national interests involved, rather than by local entities with "any jurisdictional tie," as urged by the United States (Br. 46).

1969, contains a graphic illustration of the congestion problem:

"On one day in July, a total of 1,927 aircraft in the vicinity of New York City were delayed either in taking off or landing — some for as long as 3 hours. From this large east-coast hub, congestion spread to other points. Once aircraft stacked up over New York's airports, other New York-bound aircraft were forced to sit on the ground either at their points of origin or elsewhere, all the while using up ramps originally intended for incoming flights. Hence, stacks began to form at other airports. . . ." (p. 75.)

If there is to be a substantial limitation on the hours during which aircraft operations are permitted, there is bound to be an increase in the congestion during the remaining hours, especially during the hours immediately before the curfew when congestion is already at its worst. Under the Federal Aviation Act, a restriction on the air transportation system having such adverse consequences should be imposed, if at all, by a centralized authority able to take into account the multiple national interests involved.*

One of the clearest demonstrations of the need for centralized coordination of restrictions on the hours of aircraft operation is the experience with the FAA's "flow control" procedures. Flow control is a means of meter-

* In this connection, the court of appeals correctly emphasized: "Pursuant to this statutory scheme, the Administrator of the FAA must balance considerations of safety, efficiency, technological progress, common defense and environmental protection in the process of formulating rules and regulations with respect to the use of the nation's airspace. . . . If State and local governments were to be allowed to exercise supplementary power in this area, they might conceivably be overprotective of one of the multiple values and upset the delicate balance struck by the FAA under the aegis of federal law." (A. 419.)

ing or restricting aircraft operations so as to cope with problems resulting from congestion, weather, equipment failure, or other impediments to air commerce. The flow control measures can involve restricting departures during a given period, or establishing separation of aircraft in time, altitude, or distance (F.F. 51, A. 390-91).

Initially, when the program was instituted in 1969, flow control decisions were made by each of the 21 Air Route Traffic Control Centers for its own area. However, in April 1970, the FAA established a Central Flow Control Facility in Washington, D.C., to correlate the information for the entire system and to coordinate the flow control decision making process (F.F. 52, A. 391). The Fourth Annual Report of the Secretary of Transportation for Fiscal Year 1970 describes the need for "centralized" control as follows:

"CENTRALIZED FLOW CONTROL. One of the more persistent problems plaguing air traffic in recent years has been the tendency of isolated instances of congestion to disrupt the flow of aircraft throughout the entire ATC [Air Traffic Control] system. On April 27, 1970, FAA took a significant step in dealing with this problem by establishing as a permanent part of the ATC system the Central Flow Control Facility in Washington, D.C.

"Prior to the establishment of this facility, the sole responsibility for flow control (i.e., controlling the flow of traffic by restricting the number of aircraft moving from one ARTCC [Air Route Traffic Control Center] to another) in the contiguous United States rested with each of 21 such centers. The shortcoming of this procedure was that each center made flow-control decisions from the limited perspective of its own control area; no center had enough information to make a judgment based on the overall condition of the ATC system. . . ."

(p. 71.)

The flow control experience shows that even temporary restrictions on aircraft operations, by holding aircraft on the ground or increasing separation between aircraft, have to be centrally coordinated if airspace management is to be effective. Just as none of the 21 centers "had enough information to make a judgment based upon the overall condition" of the system, it is even more apparent that no local governmental entity would have enough information to make a judgment as to the effect on this system resulting from a lasting restriction such as a curfew. This judgment can be made only by an entity with sufficient information concerning the system *and* with authority to make the adjustments necessary to keep the system operating efficiently.

Curfews are highly contagious, and thus, as the record shows, the Burbank curfew cannot be considered in isolation (F.F. 69, A. 396). The drastic effect of curfews on federal airspace management can be fully appreciated only in relation to flight scheduling across the six time zones into which the United States is divided:

— If an 11 p.m. to 7 a.m. curfew on jet takeoffs were in force at Burbank and at Portland, Continental Air Lines could originate flights northbound or southbound along its route from the Los Angeles area to Seattle (all within the same time zone) only between 7 a.m. and 7 p.m. (F.F. 67, A. 396). Standing alone, the Burbank curfew affects Seattle residents by limiting southbound departures on this route to the period from 7 a.m. to 7 p.m. (F.F. 66, A. 395).

— If an 11 p.m. to 7 a.m. curfew on jet takeoffs were in force over the entire route from Seattle to New Orleans, Continental Air Lines would be able to originate eastbound departures only between 7 a.m. and 2 p.m. (F.F. 68, A. 396).

— If a nationwide 11 p.m. to 7 a.m. curfew on jet takeoffs and landings were in force over the entire route covering six time zones, an air carrier could originate an east-bound flight from Honolulu to New York only between the hours of 7 a.m. and 9 a.m.

The drastic effect of curfews was described to subcommittees of the House Commerce Committee as early as December 4, 1962, by John R. Wiley, Director of Aviation, Port of New York Authority. Mr. Wiley gave a detailed description of the "progressive strangulation of air commerce between just one pair of cities, New York and London, if each were to impose a 10 p.m. to 7 a.m. curfew," and then summed up the broader consequences as follows:

"[I]f this practice should be extended to other airports throughout the world, east and west of New York and London, and in different time zones, I believe we can readily see that we would have a situation so chaotic as to make the airplane worthless as an instrument of world communication." *Hearings Before Subcomms. of the House Comm. on Interstate and Foreign Commerce, 86th & 87th Cong. 528-30 (1963) [hereinafter cited "1959-1962 House Hearings on Aircraft Noise Problems"]*.

Opposition to nighttime restrictions as a "blockade on traffic flow" extending beyond the curfew period and affecting "all airports within the traffic flow" was expressed by the Airport Operators Council International (AOCI) in the 1971 House hearings in connection with the Noise Control Act:

"A single curfew at a major U.S. airport acts as a blockade on traffic flow not only within the time of the curfew, but also at other times for interstate and international aviation traffic operating in different time zones. This problem is especially damaging to night-

time traffic, often cargo traffic, which if thrown upon the daytime schedule would crowd already heavily burdened air traffic facilities. This in no way would be in the best interest of the traveling public nor to the nation's economy." *Hearings on H. R. 5275, et al., Before the Subcomm. on Public Health and Environment of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 2d Sess., Ser. No. 92-30, at 483 (1971).*

The brief for the United States refers to curfews "already in existence" at Washington National, Morristown, New Jersey, London and "many major European cities," apparently attempting to show that states and localities have curfew authority and that centralized management is unnecessary (Br. 41-42). The examples, however, show the opposite. Washington National Airport, where the restriction is the result of a "voluntary agreement" of the carriers, is operated by the Federal Aviation Administration. *Virginians for Dulles v. Volpe*, 344 F. Supp. 573 (E.D. Va. 1972). As to the restriction on nighttime operations imposed at Morristown Airport by a state court, the United States has filed an action in the federal court in New Jersey to compel the dissolution of that restriction. *United States v. Town of Morristown*, Civil No. 1214-72, D.N.J. (filed July 17, 1972). The prayer in that action asks that the Town of Morristown, the Township of Hanover and other defendants be compelled to file a joint motion to modify the state court judgment to delete "the restrictions imposed against the landing and takeoffs of jet aircraft."

Moreover, contrary to the government's implication, the foreign precedents firmly support our position that curfews are a crucial aspect of airspace management which require centralized regulation at the national level. Our investigation has failed to disclose any country in which airport curfews are imposed other than by the

national government concerned or under its direct supervision.*

- * See: Australia: Air Navigation Act 1920-1971, §26(2)(e); and Air Navigation Regulations, Reg. 82(2). [Director-General of Civil Aviation may establish curfews pursuant to his statutory power to regulate "establishment, maintenance, operation, and use of aerodromes".]

Canada: Aeronautics Act, CAN. REV. STAT. 1970, ch. A-3, §6; and Air Regulations, SOR/61-10 (1960), *as amended* by SOR/69-627 (1969), §104. [Minister of Transport may establish curfews pursuant to his statutory power to control and regulate air navigation in Canada.]

France: C. AVIATION Civ. art. R221-3 (1968); and Ministry of Transport Decision, April 4, 1968 (pertaining to Orly Airport). [Secretariat of Civil Aviation may restrict airport use if restriction justified by reasons of public policy.] See also Ministry of the Interior Circular No. 70-463 (Oct. 17, 1970), stating that decisions purporting to forbid aircraft overflights of any area within France must be made at the ministerial level.

Germany: Luftverkehrsgesetz (Air Navigation Act) (1968), BGBl. IS. 1113, §6. [Supervisory control over airports delegated to state ministries, but they act subject to approval of Federal Ministry of Transportation.]

Jamaica: Civil Aviation Act 1966, §§3(2)(s) and 10(1)(f). [Ministry of Communications and Works given general power to regulate the establishment and conditions of use of airports.]

Japan: Local airports have imposed curfews, but only pursuant to an Administrative Guidance, Ministry of Transportation (Mar. 29, 1972) and after recommendations of the Environmental Protection Department as required by Law No. 88, art. 6, para. 3 (1971).

Switzerland: Concession of the Operation of the Airport of Geneva-Cointrin (Nov. 20, 1951, *as amended* Mar. 23, 1972). [Airports are operated pursuant to federal charter; amendment of charter was considered necessary to permit imposition of curfews.]

United Kingdom: Civil Aviation Act of 1971 c. 75, §29; STAT. INSTR. 1971 No. 1686; STAT. INSTR. 1971 No. 1687; and U.K. Air Pilot, AGA 116C, (London-Heathrow) (Mar. 21, 1972). [Secretary of State given express power of regulating aerodrome operations to prevent noise; issues curfews and other restrictions via Notices to Airmen.]

The airports of Basel-Mulhouse (operated pursuant to a Franco-Swiss treaty of 4 July 1949) and Berlin (operated by the Allies) are considered special cases exempt from the statutory schemes outlined above.

The adverse effects of curfews on airspace management are summarized in the Findings of Fact.* Based upon testimony at the trial, the district court found that curfews would increase congestion, aggravate the noise problem, and cause a loss of efficiency:

"The imposition of curfew ordinances on a nationwide basis would result in a bunching of flights in those hours immediately preceding the curfew. This bunching of flights during these hours would have the twofold effect of increasing an already serious congestion problem and actually increasing, rather than relieving, the noise problem by increasing flights in the period of greatest annoyance to surrounding communities. Such a result is totally inconsistent with the objectives of the federal statutory and regulatory scheme." (F.F. 78, A. 399.)

"The imposition of curfew ordinances on a nationwide basis would cause a serious loss of efficiency in the use of the navigable airspace. . . ." (F.F. 82, A. 400.)

It is utterly inconsistent for the United States, having recognized that airspace management is an exclusively federal domain, to argue that local authorities are free to exercise their police power to impose curfews. To insure safety and efficiency, federal airspace management must encompass decision-making power with respect to hours of operation at airports like Hollywood-Burbank.

* The Findings in this case were based upon the district court's "Memorandum for Use in Preparation of Proposed Findings of Fact, Conclusions of Law, and Judgment" (R. 278). The Findings were settled by the court after a hearing on the objections of the defendants (appellants here) (R. 312, 330, 332, 340, 362, 367).

B. The FAA Has Long Regarded Local Curfews as Detrimental to Federal Airspace Management.

1. Congressional reliance on the FAA in noise abatement matters.

In noise abatement matters, Congress has consistently looked to the FAA in preference to other federal agencies. As pointed out in our principal brief (pp. 26-27), the Federal Aviation Act of 1958 vested plenary authority for airspace management in the Federal Aviation Administrator. The Administrator's authority was intended to include broad rulemaking power to regulate noise in the vicinity of airports, as we discuss at pp. 25-28, *infra*.

The specific question of the agency to be responsible for noise abatement matters arose in connection with the 1968 Amendment to the Act. At that time, the Administration proposed a bill (H.R. 3400) which would have empowered the Secretary of Transportation to prescribe aircraft noise abatement rules and regulations. *Hearings on H.R. 3400, H.R. 14146 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 1st & 2nd Sess., Ser. No. 90-35, at 1 (1968)*. However, the bill reported out of committee placed this authority in the Administrator of the FAA. H.R. REP. No. 1463, 90th Cong., 2nd Sess., at 1, 5 (1968) [hereinafter "H. R. REP. No. 1463"]. Representative Pickle explained in the debates that the House committee had "revested the noise functions in the FAA" 114 Cong. Rec. 16387 (1968). And the legislation ultimately enacted fixed responsibility in the FAA. Pub. L. No. 90-411, 82 Stat. 395 (1968).

In 1972 when Congress amended the noise abatement provision of the Federal Aviation Act, it again rejected an attempt to place noise abatement authority in another agency. In the House, a floor amendment which

would have placed this authority in the Administrator of the Environmental Protection Agency (EPA) was rejected, and the bill which passed (H.R. 11021) on February 29, 1972 continued to place aircraft noise abatement authority in the Administrator of the FAA. 118 Cong. Rec. H 1525, 1532 (daily ed. Feb. 29, 1972). However, the bill passed by the Senate on October 13, 1972 would have placed noise abatement authority in the Administrator of EPA. S. 8342, §501(a), 118 Cong. Rec. S 18013 (daily ed. Oct. 13, 1972). When the Senate and House versions were blended together into the form in which the legislation was ultimately enacted, the final authority to prescribe and amend noise abatement regulations was retained by the FAA. Noise Control Act of 1972, Pub. L. No. 92-574, § 7, 86 Stat. 1239, *reprinted as Appendix A* to our principal brief.

Thus, twice within the last five years, Congress has deliberately reaffirmed its decision, initially taken in 1958, to place the Government's regulatory authority over noise in the FAA and not in some other agency.

2. Position of the FAA in the lower courts.

Because Congress has vested in the FAA ultimate authority for noise abatement regulations, the views of the FAA are of great weight. In the trial court, the United States Attorney for the Central District of California filed an *amicus curiae* brief on behalf of the FAA, contending that the FAA's authority over all aspects of airspace management leaves no room for local curfew ordinances:

"In enacting the Federal Aviation Act of 1958, Congress intended to establish the right of every citizen to freedom of transit through the navigable airspace of the United States and to facilitate the exercise of that right by a federal regulatory scheme which would

promote both the efficient use of navigable airspace and the efficiency of aircraft operations. In order to achieve this purpose, Congress vested the Administrator of the FAA with 'plenary' and 'unquestionable authority for all aspects of airspace management.' S. Rep. No. 1811, 85th Cong., 2d Sess. 14 (1958). In this connection, there is no question but that Congress intended that the Administrator deal with the problem of airspace congestion in the exercise of his broad authority over *all aspects of airspace management*. Id. at 13-17.... It is clear, however, that neither the efficient use of navigable airspace nor the efficiency of aircraft operations is served by local ordinances which would prohibit the use of navigable airspace for fully one-third of the hours available for such use. And it is equally obvious that local curfew ordinances necessarily aggravate the congestion problem by drastically reducing the hours available for scheduled services. Accordingly, such local legislation with objectives different than those which Congress has sought to achieve must yield." (pp. 10-11; emphasis added.)*

The FAA's position with respect to the ordinance is summed up in the conclusion to its brief, as follows:

"The Burbank jet aircraft curfew ordinance is invalid since it attempts to regulate in a field preempted by Congress. The ordinance places an intolerable burden on interstate and foreign commerce, by removing from use during an eight-hour period each day, an airport which is a vital part of the national airport system. A proliferation of this type of local ordinance by non-proprietors of airports would stagnate and

* Ten copies each of the briefs for the FAA filed in the trial court and the court of appeals have been lodged with the Clerk.

destroy the national air transportation system..." (pp. 15-16).*

In the Court of Appeals for the Ninth Circuit, the United States Attorney again filed an *amicus curiae* brief on behalf of the FAA. The FAA brief, which supported the trial court's opinion in all aspects, took the following position on the preemption question:

"The efficient use of navigable airspace and the efficiency of aircraft operations are clearly not served by local ordinances that would prohibit the use of airspace for large portions of each day — in Burbank's case fully one-third of the available hours. See Findings of Fact 70-77, 79-82. And equally obvious is the fact that local curfew ordinances necessarily aggravate congestion problems by reducing the hours available for scheduled services. See Finding of Fact 78. *Thus, the results produced by local regulation such as that in question are clearly inconsistent with the intention of Congress, as expressed by it and as construed by the agency charged with administration of the nation's airspace.* The efforts of the Administrator would come to naught and the will of Congress would be thwarted if every locality were to enact similar laws. See Findings of Fact 78, 82." (pp. 17-18; emphasis added.)

3. Opposition of FAA to curfews at other airports.

The opposition of the Administrator of the FAA to locally imposed curfews on commercial jet operations extends from the beginning of the commercial jet age

* The Department of Transportation took a remarkably similar position in its "Opinion" filed in 1971 in the Supreme Judicial Court of Massachusetts, which is set forth as Exhibit A to the Answering Brief of the Port Authority of New York and New Jersey as *Amicus Curiae* filed in this case.

in 1959 up to the present time. The frequently voiced opposition by the FAA to locally imposed curfews totally refutes the claim of the Brief for the United States (p. 52) that any rejection by the FAA of night curfews as a noise abatement measure would have represented "a major change in federal policy." In instance after instance, the FAA has indicated opposition to curfews, and has placed reliance instead on preferential runway or other noise abatement procedures consistent with continued operation of the airport.

On October 28, 1959, the FAA announced that it had under consideration a Special Civil Air Regulation for Los Angeles which would have, among other things, restricted jet operations between 10:00 p.m. and 7:00 a.m. 24 Fed. Reg. 9020 (1959). However, when adopted in 1960, the Regulation omitted the proposed restriction because of the FAA's conclusion that such restrictions could "create critically serious problems to all air transportation patterns." 25 Fed. Reg. 1764-65 (1960). The FAA statement said:

"The proposed restriction on the use of the airport by jet aircraft between the hours of 10 p.m. and 7 a.m. under certain surface wind conditions has also been reevaluated and this provision has been omitted from the rule. The practice of prohibiting the use of various airports during certain specific hours could create critically serious problems to all air transportation patterns. The network of airports throughout the United States and the constant availability of these airports are essential to the maintenance of a sound air transportation system. The continuing growth of public acceptance of aviation as a major force in passenger transportation and the increasingly significant role of commercial aviation in the nation's economy are accomplishments which cannot be inhibited if the best interest of the public is to be served. It was concluded therefore

that the extent of relief from the noise problem which this provision might have achieved would not have compensated the degree of restriction it would have imposed on domestic and foreign Air Commerce."

When the question of a night curfew arose again in the Los Angeles area more than a decade later, the FAA indicated its continued opposition to curfews in a letter dated August 3, 1971 to the Executive Officer of the Los Angeles County Board of Supervisors, who had inquired regarding the feasibility of restricting aircraft operations between 11:00 a.m. and 7:00 p.m. at five general aviation airports operated by Los Angeles County. The reply of FAA Regional Director, which is set forth as Appendix A to this Supplemental Brief, stated:

"... Noise abatement flight procedures and preferential runway use procedures have been applicable and used at Los Angeles International Airport for some years. . . . We believe that other restrictions, particularly the type described in your letter, would place an intolerable burden on air transportation and air commerce, and would be detrimental not only to the City of Los Angeles but to the County of Los Angeles.

"Under the circumstances, we would not look favorably on any restriction of aircraft operations such as being studied by the Los Angeles County Board of Supervisors. . . ."

On February 2, 1971, the FAA took a similar position in a letter to the attorney for the San Diego Unified Port District in opposition to the proposed curfew at the San Diego International Airport. The letter of the FAA Regional Counsel, which is set forth in Appendix B to this Supplemental Brief, stated:

"Basically the FAA is opposed to any type of night curfew at airports which would have an effect on the

national air transportation system. In summary, our legal position has been that the Federal Government has preempted the authority to regulate the efficient use of the airspace and to regulate aircraft noise and, therefore, the imposing of a night curfew by others is invalid and unconstitutional...."

On August 31, 1960 the FAA Administrator issued a Special Civil Air Regulation for New York International Airport with a primary objective of reducing noise. In announcing this regulation, the Administrator stated that the FAA was rejecting a suggestion "to prohibit the operation of jet aircraft during nighttime hours" as being "not compatible with the critical need in the New York area for air transportation services." 25 Fed. Reg. 8538 (1960).

Over eleven years later the invalidity of a curfew was again stressed in New York State in a letter dated February 22, 1972 from the FAA Eastern Regional Director to the Chairman of a New York State Assembly Committee regarding a bill to prohibit landings and takeoffs between 11:00 p.m. and 7:00 a.m. The letter, which is set forth in Appendix C, stated:

"We view the proposal as attempting to control the operation of aircraft and use of the navigable airspace, functions which are the particular domain of the Federal Government"

Similarly, in a letter dated May 10, 1972 to the Director of the Houston Intercontinental Airport, the Southwest Regional Director of the FAA stated his feeling that "the curfew, if allowed to proliferate, will ultimately have a deleterious effect on the National Aviation System because of its 'ripple' effect," and he strongly recommended against its adoption at the Houston Airport (letter set forth as Appendix D to this Supplemental Brief).

The opposition of FAA officials to curfews reflects careful evaluation of their practical consequences. Attached as Appendix E to this Supplemental Brief is a memorandum dated March 10, 1972 by Herbert J. Guth, FAA Director of Aviation Economics, entitled "Economic Impact of Night Curfews at Airports," the crux of which is summed up in the first paragraph:

"The airlines, the airport operators, and the public who use air transportation would be significantly affected by the imposition of night curfews at United States airports. Utilization would drop particularly in the larger long-haul aircraft. Capacity in high density markets would decrease and peaking at the major airports would be intensified. The result would be increased costs to the airlines, increased airport delays, and increased prices for the purchase of air transportation."

In sum, FAA has consistently found curfews on night operations at air carrier airports comparable to Hollywood-Burbank to be detrimental to effective airspace management and an invasion of a federally preempted area. If federal airspace management is to achieve the goals set for it by Congress, there can be no room for curfews imposed by local jurisdiction through the exercise of police power.

II. THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS INTENDED TO PREVENT LOCAL JURISDICTIONS FROM EXERCISING POLICE POWER IN MATTERS OF AIRSPACE MANAGEMENT, AIRCRAFT OPERATIONS AND AIRCRAFT NOISE.

The brief for the United States founders upon the fundamental misstatement of three key elements of the legislative history of the Federal Aviation Act:

— The Government asserts, as the cornerstone of its argument, that the regulation of aircraft noise was not the subject of any congressional enactment prior to 1968 (Br. 23-24). This pronouncement is wrong. The legislative history demonstrates conclusively that the FAA's broad authority to make regulations "for the protection of persons and property on the ground" was written into the 1958 Act as a direct result of congressional concern with the problem of aircraft noise in the vicinity of the nation's airports. 1959-1962 House Hearings on Aircraft Noise Problems 543-44.

— Under the 1958 Act, Congress intended to vest authority for all aspects of airspace management once and for all in the Administrator of the FAA. To permit a local entity with "any jurisdictional tie" to an airport to disallocate airspace by imposing a night curfew, as urged by the United States (Br. 46), would fractionalize the authority for airspace management in direct opposition to the congressional purpose.

— The brief for the United States incorrectly asserts that the legislative history "has not . . . focused upon the distinction between airport control in a proprietary capacity and airport control by means of the exercise of police power" (Br. 45). It was precisely this distinction that was accepted by the Senate Commerce Committee in 1968 as marking the limits of permissible local regulation. In reporting the 1968 noise abatement amendment, the Senate committee concurred in the representation of the Secretary of Transportation that "State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." S. REP. No. 1353, 90th Cong., 2d Sess. 6 (1968). The Government has attempted to bury this representation by the Secretary and thereby to distort the limited reservation of power to the airport proprietor intended by Congress into a

license for any local entity having a jurisdictional tie to regulate aircraft operations by police power.

A. In the 1958 Act the FAA Administrator Was Granted Broad Rulemaking Authority To Deal With Aircraft Noise.

We demonstrated in our principal brief (pp. 28-29, 34-35) that the FAA has promulgated extensive noise abatement regulations under the 1958 Act's directive "to prescribe air traffic rules and regulations . . . for the protection of persons and property on the ground," 49 U.S.C. §1348(c). The Government asserts that this provision of the Act was included to provide protection "from insecticides sprayed from the air" and "was wholly unrelated to any congressional consideration of aircraft noise problems" (Br. 22-23). The legislative history demonstrates otherwise.

The Government bases its "insecticide" argument on the appearance of Congressman Preston before a House subcommittee on July 1, 1958. *Hearings on H.R. 12616 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. 267-69 (1958) [hereinafter "House Hearings on the 1958 Act"]. This member did in fact propose to add the words "for the protection of persons and property on the ground" to section 601(a)(6) of the existing law. *Id.* at 268; compare *id.* with Civil Aeronautics Act of 1938, §601(a)(6), 52 Stat. 1008. His amendment was offered to provide the Administrator with authority to control the dissemination of insecticides in crop dusting and with the author's recognition that "there would be other matters involved under this power . . ." House Hearings on the 1958 Act, at 268.

Congressman Preston's suggestion was not, however, the source of the Administrator's authority conferred by section 1348(c) of 49 U.S.C. to regulate "for the protec-

tion of persons and property on the ground." This language originated in Senate testimony given two weeks earlier by James T. Pyle, then Administrator of Civil Aeronautics. On June 17, 1958 Administrator Pyle recommended an amendment to section 601(a)(7)* of the existing law to "make it unmistakably clear that the Administrator has the authority to issue air traffic rules for the protection of persons and property on the ground as well as for the safe operation of aircraft." *Hearings on S. 3880 Before the Subcomm. on Aviation of the Senate Comm. on Interstate and Foreign Commerce, 85th Cong., 2d Sess. 245-46 (1958)*; [hereinafter "Senate Hearings on the 1958 Act"]; see *id.* at 10. This recommendation was accepted by the committee: the amended provision was reported on July 9, 1958 as section 307(c) of S. 3880, 104 Cong. Rec. 13627 (1958), and was ultimately enacted as section 307(c) of the 1958 Act, 49 U.S.C. §1348(c). It provides:

"The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, *for the protection of persons and property on the ground*, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects." (Emphasis added.)

Unmistakable evidence that Congress intended, in adopting section 1348(c) of 49 U.S.C., to provide the Ad-

* It was section 601(a)(7) which was the predecessor of 49 U.S.C. §1348(c), not section 601(a)(6) (the target of Congressman Preston's suggested amendment). Compare section 601(a)(6) and (7) of the Civil Aeronautics Act of 1938, 52 Stat. 1008, with 49 U.S.C. §1348(c).

ministrator with broad rulemaking authority to regulate noise in the vicinity of airports is found in the 1959-1962 House Hearings on Aircraft Noise Problems. On December 4, 1962 Chairman Oren Harris of the House Interstate and Foreign Commerce Committee discussed with Administrator Halaby the FAA's authority "to deal with this subject [of noise], particularly with reference to zoning and location of airports and all the things that are necessary in its operation." *Id.* at 543. Chairman Harris stated:

"I can refer you to the committee report of the 86th Congress, filed October 15, 1959. That was shortly after the Congress approved the new Federal Aviation Agency, of course, some time before you arrived on the scene and accepted your tremendous responsibility.

"We said in that report, and I am quoting page 7:

'For many years, the committee has been engaged in the study of aircraft noise problems which are considerable in the vicinity of some of the Nation's major airports. In writing the Federal Aviation Act of 1958, Congress expressly gave the new Federal Aviation Agency authority to make regulations "for the protection of persons and property on the ground," a broad extension of the rulemaking authority which had been granted to the Civil Aeronautics Board by the Civil Aeronautics Act of 1938.'

"Now, if I recall, during the course of that legislation, we had a colleague from Georgia, Mr. Prince Preston, who brought to the attention of this committee a problem with reference to the dusting of cotton.

"The committee considered that problem, and if I recall correctly, we decided not to limit this authority to crop dusting, and we reminded the Congress in that report that we did extend the broad rulemaking authority.

"...

"Now, I feel, Mr. Halaby, and you gentlemen of the airport operators' council, that the Congress did consider this matter and the authority when the FAA Act was passed in 1958, and I feel that there is legislative history that does give you the authority." *Id.* at 543-44.*

Chairman Harris was "a principal architect" of the Federal Aviation Act of 1958. *Id.* at 545. His elucidation that Congress adopted section 1348(c) of 49 U.S.C. to give the Administrator "broad rulemaking authority" over aircraft noise problems lays to rest the Government's insecticide claim.

The Government is also in error in representing as fact, without any supporting reference, that between 1958 and 1968 the authority conferred by 49 U.S.C. §1348(c) was exercised by the Administrator only to the extent of establishing preferential runway requirements at "a few selected noise-sensitive airports" (Br. 50). As early as 1962, noise abatement runway patterns were in use "in every major airport in the United States." Testimony of CAB Chairman Alan S. Boyd on December 4, 1962, 1959-1962 House Hearings on Aircraft Noise 507. And, of course, the record in this case demonstrates that such an FAA order was in effect at Hollywood-Burbank Airport (PX 30, A. 113, 453-62).

B. The Purpose of the 1958 Act Was To End Jurisdictional Divisions and Vest Plenary Authority Over Airspace Management and Aircraft Operations in the FAA Administrator.

The Federal Aviation Act of 1958 was designed to correct two fundamental deficiencies existing at the time

* The report referred to by Chairman Harris is H.R. REP. No. 1192, 86th Cong., 1st Sess. (1959).

of enactment with respect to the Government's responsibility for aviation matters. These shortcomings were identified by the Senate Commerce Committee Report as (1) the "diffusion of authority for the general regulation of civil aeronautics" and (2) the "lack of clear statutory authority for centralized airspace management." S. REP. No. 1811, 85th Cong., 2d Sess. 10 (1958) [hereinafter "S. REP. No. 1811"]. The report notes that the question of airspace management had been "hardly conceived" when our basic aviation statutes, the Civil Aeronautics Act of 1938, and the Air Commerce Act of 1926, were enacted. *Id.* at 13. The years between 1938 and 1958 had witnessed a quadrupling of air traffic, the introduction of larger and faster aircraft which required more airspace to maintain separation, and increased military air operations. By 1958 the nation's airspace had become overcrowded and was described in the Senate Report as "a diminishing resource." *Id.* at 13-14.

Prior to adoption of the 1958 Act, responsibility for the allocation of airspace was divided among the Civil Aeronautics Board, the Civil Aeronautics Agency, the President and the Secretary of Defense. This situation was characterized in hearings on the 1958 Act by General Quesada, then Chairman of the Airways Modernization Board and later the first FAA Administrator, as follows:

"In this hodgepodge of authorities, the committee method has been used to assign airspace on a case-by-case basis resulting in long debate, serious delay, and patchwork solutions. This method has contributed to congested conditions in large sectors of the country, forcing serious inflexibilities on both civil and defense operations." House Hearings on the 1958 Act, at 30.

This "splintering of airspace management" was one of the evils the 1958 Act was designed to eliminate. S. REP. No. 1811, at 15. This was accomplished, in the words

of the Senate Report, "by vesting unquestionable authority for all aspects of airspace management in the Administrator of the new [Federal Aviation] Agency." *Id.* at 14. Thus Congress provided in section 1348 (a) of 49 U.S.C. as follows:

"The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace...."

Having vested this "plenary" authority in the Administrator, Congress was careful to guard against any future "fractionalization" of his authority by providing in section 1341(a) of 49 U.S.C. that:

"In the exercise of his duties and the discharge of his responsibilities under this chapter, the Administrator shall not submit his decisions for the approval of, nor be bound by the decisions or recommendations of, any committee, board, or other organization created by Executive order." S. REP. No. 1811, at 15.

Congress also recognized in adopting the 1958 Act that "effective airspace management and planning is not a matter involving airborne craft alone." S. REP. No. 1811, at 16. Airspace requirements generated by airport and runway locations also demanded centralized regulation and control. Congress provided the Administrator the means to assure conformity to his plans and policies for, and allocations of, airspace in sections 1349 and 1350 of 49 U.S.C. Section 1349 provides in substance that no federal funds shall be expended for the construction or substantial alteration of civil or military airports until the location, plans and layouts thereof have been approved by the Administrator. Similarly, section 1350

prohibits the establishment or construction of civil airports not receiving federal funds, or even the substantial alteration of a runway layout, without prior compliance with regulations prescribed by the Administrator. *See also* 49 U.S.C. §1353(a).

For its contention that the 1958 Act "was not understood" to have divested states and their instrumentalities of authority to impose airport curfews (Br. 24-25), the Government relies on the 1962 statements of the then Deputy General Counsel of the FAA, James Hill. 1959-1962 House Hearings on Aircraft Noise Problems, at 670, 699. Mr. Hill made his remarks as a panelist during a discussion of "existing legal rights of the private citizen who is aggrieved by aircraft noise" (*id.* at 642).

The Government's reliance on Mr. Hill is misplaced for several reasons. His statements do not cast light upon the intention of Congress; rather they are, in his own words, "off-the-cuff" expressions of a lawyer's opinion (*id.* at 659, 672). Mr. Hill first stated that "whether jets land at all or not at an airport or whether they take off at night or not is up to the municipality" that "owns the airport" (*id.* at 670). Then he acquiesced in the statement that the FAA was "not sure whether or not airport operators can bar jets" (*id.* at 672-73). During the discussion several instances of Mr. Hill's confusion concerning the scope of FAA authority and responsibility were clarified by other panelists (*e.g.*, *id.* at 670; *compare id.* at 675 *with id.* at 676-77).

The panel discussion centered around the Court's recent decision in *Griggs v. Allegheny County*, 369 U.S. 84 (1962), and Mr. Hill was clearly anxious to admit of no federal authority that would change the result in that case. 1959-1962 House Hearings on Aircraft Noise Problems, at 671; *see also id.* at 697. But at no time did Mr. Hill suggest that state and local governments could reg-

ulate aircraft noise through an exercise of police power. Rather he consistently referred to requirements of the "community that owns the airport" or the "municipality that built the airport" (*id.* at 670, 671).

In sum, the regulation of air traffic flow from the surface of an airport into the navigable airspace constitutes a crucial aspect of the airspace management responsibility vested in the FAA by the 1958 Act. Any governmental entity which regulates the hours that this air traffic may flow from the surface of an airport is engaged in airspace management. The Department of Transportation has overruled the position taken by the FAA in each of the lower courts and now urges the Court to hold that State and local governments with any jurisdictional tie to an airport be allowed to exercise their police power to regulate by curfew the hours of airport operation. Such a holding would be antithetical to the result sought by the 1958 Act because it would allow local entities to disallocate airspace and thereby fractionalize the authority vested in the Administrator of the FAA.

C. The 1968 Amendment Banned Any Exercise of Police Power by Local Jurisdictions.

During the Senate hearing on the 1968 noise abatement amendment, the Secretary of Transportation was asked by Commerce Committee Chairman Monroney whether State and local governments could "go beyond" the minimum noise emission standards to be set by the FAA Administrator under section 611, 49 U.S.C. §1431. Secretary Boyd replied:

"I do not think the State could. I would like to have the opportunity to submit an opinion for the record.

"I would think that any authority would be related to the airport itself, Mr. Chairman, but we would like to submit a written opinion on that." *Hearing on S.*

707 and H.R. 3400 Before the Aviation Subcomm. of the Senate Comm. on Commerce, 90th Cong., 2d Sess., Ser. No. 90-72, at 29 (1968).

The letter submitted by the Secretary of Transportation in further response to Chairman Monroney's question is printed in the hearing (*id.* at 61) and quoted extensively in the Senate Report. The report declares that the Senate Committee concurs in the Secretary of Transportation's representation that "State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." S. REP. NO. 1353, 90th Cong., 2d Sess. 6 (1968) [hereinafter "S. REP. NO. 1353"]. The Senate Report also expressly concurred in the following statement by the Secretary of Transportation concerning the limited powers of "airport owners acting as proprietors":

"However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." *Id.*

The Secretary's letter also indicated that the 1968 amendment would "expand the Federal Government's role in a field already preempted" (*id.*), citing as authority the district court opinion in *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967). The district court held that an attempt to regulate aircraft noise by local police power was unconstitutional on both preemption and conflict grounds. The Government purports to find unexplained significance in the chronology of the Secretary's letter having been written to the

Senate committee approximately three weeks before the court of appeals affirmed *Hempstead* on the conflict ground without reaching the preemption issue (Br. 47 n. 38). The chronology demonstrates, however, that the 1968 amendment was passed by both houses of Congress prior to the Second Circuit's affirmance of the district court opinion. 114 Cong. Rec. 16399, 20931 (1968). And it was the preemption aspect of the district court's opinion that was expressly concurred in by the Senate Report. S. REP. No. 1353, at 6.

In the face of this clear legislative history, there is no merit to the suggestion of the brief filed by the United States and expressing the views of the Department of Transportation that, in adopting the 1968 amendment, Congress had not "focused" on the distinction between requirements established in a proprietary capacity and regulations imposed by the exercise of police power (Br. 45). Indeed, the distinction is the very one which the Secretary of Transportation drew in his letter to the Senate committee and which the committee then adopted.

The Government also errs seriously when it attempts to argue that this distinction, advanced by the Secretary of Transportation and concurred in by the Congress, is not valid (Br. 36 n.27, 44-48). This constitutes a blatant attempt to rewrite legislative history and thereby to thwart the explicit intention of Congress. In any event, the Government's challenge to the wisdom of Congress is not persuasive.

The Government purports to demonstrate that the distinction would lead to the "logically bizarre result" of a federal preemption policy that applies only to private airports (Br. 45-46). This is based on the assumption that Congress intended to preempt police power regulation only in the rare situation where the airport is not owned by a local governmental entity. Viewed correctly, however, the federal preemption intended by Congress applies

nationwide to all airports without regard to ownership and precludes resort to any local police power regulation. It was not the public or private character of the airport's ownership that Congress found determinative of federal preemption, but rather whether the regulation sought to be imposed was issued in a police or proprietary capacity. Accordingly, the preemption recognized by the Senate Report bars the purported application of police power to any airport, irrespective of the character of its ownership, but would permit certain kinds of regulation in a proprietary capacity by both publicly and privately owned airports.

In making this distinction, Congress did not act thoughtlessly or irresponsibly. As succinctly stated at page 7 of the Answering Brief of the Port Authority of New York and New Jersey as *Amicus Curiae*, Congress intended to do no more than to preserve an ancient "common-law right which inheres to the owner and operator of land." For Congress to seek to preserve an incident of property ownership, whatever it may prove to be,* from the broad sweep of federal preemption is reasonable. What is unreasonable is to contend that this preservation of a landlord's right necessarily implies a congressional intention to permit the States and each of the multiple subdivisions surrounding most airports to exercise their police power over these airports.

The Answering Brief of the Port Authority of New York and New Jersey as *Amicus Curiae* illustrates at pages 2-3 a number of situations where "local governments own and operate airports which are physically

* The scope of airport proprietors' rights as such has not been judicially defined. Any resolution of such rights would involve the application of difficult constitutional, statutory and contractual principles to a factual record which is not before the Court in this case.

located in whole or in part within the boundaries of other units of government." Other illustrations of this condition were depicted at trial by the former head of the Civil Aeronautics Administration (A. 292-93). And during the 1959-1962 House Hearings on Aircraft Noise Problems, FAA Administrator Halaby recounted additional examples:

"For example, in Cincinnati the principal airport is in another State, not even the same city or county. That is true in Friendship. It is outside the city of Baltimore. The San Francisco Airport is not in the County of San Francisco..." (*Id.* at 532.)

Indeed, this situation exists at Hollywood-Burbank Airport where over 2,000 feet of one runway lie within the City of Los Angeles (F.F. 12, A. 346).

In light of the potential for interference which thus exists at many of our nation's airports, Congress doubtless recognized that to allow police power regulation of aircraft noise by local entities with "any jurisdictional tie" to an airport, as here urged by the Government (Br. 46), would be to invite chaos in the national air transportation system.

D. The 1972 Act Did Not Alter the Proprietary-Police Power Distinction.

The legislative history of the Noise Control Act of 1972 is discussed at pages 40-47 of our principal brief. This history demonstrates that the Act was designed not to change the law with respect to federal preemption of aircraft noise regulation. The House Report states:

"No provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of State and local governments that existed with respect to matters covered by

section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill." H.R. REP. No. 92-842, 92d Cong., 2d Sess. 10 (1972).

An identical statement is contained in the Senate Report. S. REP. No. 92-1160, 92d Cong., 2d Sess. 10-11 (1972).

Thus Congress' 1968 declaration — that local attempts to regulate aircraft noise through police power were federally preempted — was left undisturbed by the 1972 Act. The Government purports to find support for Burbank's curfew ordinance in the recollection of Representative Collier (Br. 42-43 & n.34). However, Mr. Collier was addressing himself only to requirements imposed in a proprietary capacity by "the local airport authority." 118 Cong. Rec. H 1535-36 (daily ed. Feb. 29, 1972). Representative Collier's remarks provide no support for an attempted police power regulation by a non-airport proprietor.

In its brief, which reportedly reflects the views of the Department of Transportation, the Government argues that Burbank's ordinance is not federally preempted because Congress has not legislated "comprehensively" on the subject of aircraft noise (Br. 38-39). This newly discovered position of the Department of Transportation is directly contrary to the views expressed by the Department in connection with the 1972 Act. The Department's response to the draft environmental impact statement (unpublished) prepared in connection with this legislation is set forth in the House Report. The Department's letter suggested that one of the paragraphs in the draft statement should be revised to place more emphasis on federal dominance of the field of aircraft noise regulation:

"Par. 3: This paragraph is inconsistent. The Federal Government has assumed the dominant role for noise (*preempted for aircraft*) in three areas:

"(a) P.L. 90-411: Standards for measurement and evaluation, and for control of aircraft noise and sonic boom.

"..." H.R. REP. No. 92-842, 92d Cong., 2d Sess. 36 (1972) (emphasis added).

The Government's brief, when compared with these comments on the 1972 Act and the Opinion of the Department of Transportation filed in the Massachusetts case in 1971, demonstrates that the Secretary of Transportation has an ever-changing view of the scope of federal preemption with respect to aircraft noise regulation. It is not, however, the vacillating view of the Secretary that is determinative of federal preemption, but rather the intent of Congress. Congress accepted the representation of the Secretary of Transportation in 1968 that local police power regulation in the area of aircraft noise was federally preempted. This view of the law was left unchanged by the 1972 Act. The intent of Congress is at odds with the latest edition of the Secretary's view of the law, and the position now urged by the Government must, accordingly, be rejected.

III. THE CONFLICT BETWEEN THE BURBANK ORDINANCE AND FEDERAL LAW IS NOT DIMINISHED BY THE UNITED STATES' BRIEF.

The Order issued by the FAA Chief of the Air Traffic Control Tower at Hollywood-Burbank stated that the preferential runway procedures outlined therein "are designed to reduce the community exposure to noise to the lowest practicable minimum" (A. 412). The court of appeals held that this "assertion represents a considered determination ... that measures of the magnitude of that taken by the City of Burbank are beneath 'the lowest practicable minimum'" and are thus in conflict with federal law (A. 426).

Since the United States recognizes that the FAA has authority to "reject" the imposition of a curfew (Br. 52 n.45), the United States is reduced to arguing that the FAA Order means something different from what it says, different from the interpretation placed on it by the FAA in its briefs in the lower courts, and different from what the trial court and the court of appeals found and held it to say and mean.* Thus, the brief for the United States asserts that the "lowest practicable minimum" language of the FAA Order "simply did not represent any consideration and rejection of the possibility of a locally imposed curfew on night operations" (Br. 51). Understandably enough, the brief for the United States offers no citation to support its "simply did not" statement. It is a pure assumption which is belied by the record and by the FAA's long-standing opposition to curfews.

The district court, having heard the testimony of FAA Tower Chief Lemmer and other witnesses regarding the Order, found that FAA had taken "in hand" the subject of nighttime takeoffs:

"In issuing this order, said FAA Chief took in hand the subject matter of nighttime takeoffs, and, based upon his authority and expertise, acted to minimize the noise consequences of such operations." (F.F. 56, A. 393.)

It is significant that the *amicus* brief for the FAA in the courts below construed the Order just as did the court of appeals, and contrary to the position now urged by the brief for the United States. In the district court, the FAA

* As part of its effort to diminish the conflict, the United States also asserts that between 1958 and 1968 the FAA exercised its noise abatement authority only "at a few selected noise-sensitive airports" (Br. 50). This is in error, for, as CAB Chairman Boyd pointed out, noise abatement procedures had been developed by the FAA "in every major airport in the United States" as early as 1962. See p. 28, *supra*.

brief attached a copy of the Order and described it as establishing "noise abatement procedures which are designed to reduce the community noise exposure to the lowest practicable minimum" (Br. 6). The FAA brief in the court of appeals takes the same position (Br. 9).

The experience a few years earlier at Los Angeles International Airport, summarized at page 20-21, *supra*, is inconsistent with the assumption made in the United States' brief that the Order at Burbank did not represent "any consideration" of a curfew. At Los Angeles the FAA explicitly considered a nighttime restriction on jet operations at International Airport but omitted it from the regulation finally adopted because such restrictions "could create critically serious problems to all air transportation patterns." 25 Fed. Reg. 1765 (1960).

Attempting to support its strained construction for the FAA's Burbank Order, the brief for the United States goes on to say (Br. 52) that rejection by the FAA of a night curfew at Burbank "would have represented a major change in federal policy." Again, this statement is unsupported. In fact, opposition to curfews has been a frequently stated and long-standing tenet of the FAA, as shown at pages 17-23, *supra*.

Curfews have been known, debated — and opposed — within the FAA for at least two decades. It strains credibility to contend that the experienced FAA Chief at Hollywood-Burbank Airport issued his Order regarding nighttime operations without "any consideration" of a curfew. Yet that is the unsupported basis of the United States' attempt to avoid the force of the FAA's Burbank Order.*

- * The two district court cases involving the Port Authority of New York, cited by the United States (Br. 50-52), do not show that the Burbank ordinance is compatible with the FAA Order. Both cases involved the exercise of proprietary, not police, power and therefore are altogether inapposite for the reasons

(Footnote continued on next page.)

IV. THE COMMERCE CLAUSE CONTINUES TO STAND AS A BARRIER TO THE BURBANK ORDINANCE.

The cursory treatment of the Commerce Clause issues in the brief for the United States is deficient and puzzling in many respects. The following points demonstrate the weakness of the Government's position:

A. The United States' brief does not address at all our contention (and the district court's holding (A. 368, 406)) that the Burbank ordinance is invalid under the second test of the *Southern Pacific* case because it purports to operate in an area where regulation should be prescribed by a single authority. This test and the correctness of district court's holding are discussed at pages 72-76 of our principal brief. In similar circumstances the Department of Transportation has evidenced complete agreement that air commerce requires regulation by a single authority. In its 1971 "Opinion" filed in the Supreme Judicial Court of Massachusetts, the Department stated:

"Air transportation, perhaps more than any form of commerce, requires regulation by a single authority. Even before 600-mile per hour flights became the custom, Congress recognized this need by the establishment of the Federal Aviation Agency. It would indeed be a harmful and regressive step to permit a compromise of the FAA's authority through permitting the enforcement of local laws or regulations regarding

stated in the preceding section. Moreover, in *Port of New York Authority v. Eastern Air Lines, Inc.*, 259 F. Supp. 745, 750 (E.D.N.Y. 1966), the FAA had written the Authority indicating its acquiescence in the restriction involved, which is to be contrasted with the FAA's opposition in the courts below to the Burbank ordinance. And in *Aircraft Owners & Pilots Association v. Port Authority of New York*, 305 F. Supp. 93, 99-100 (E.D.N.Y. 1969), the court stressed that the Authority's fee structure had been tacitly approved in the FAA "high density airports" rule.

the use of navigable airspace." *Reprinted in Answering Brief of the Port Authority of New York and New Jersey as Amicus Curiae* 12a-13a.

B. Without citation, the Government's brief (p. 56) asserts that although an approach evaluating the nationwide effect of curfews "might be appropriate in some cases, we believe it is not correct in the present case." This statement ignores the settled course of decision in this Court that the local regulation should not be regarded as an isolated phenomenon but should be weighed and tested as if similar regulations were enacted throughout the United States (*see Appellees' Br. 72, 77*).^{*} Indeed, the Department of Transportation's opinion in the Massachusetts case acknowledges that the effect of nationwide application of a local restriction should be considered in matters involving the national air transportation system:

"Such regulation cannot be considered solely 'in the accident of its particular circumstances.' *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226, 231-232 (E.D. N.Y. 1967), for, if upheld, it would likely spread to other major airports and the inevitable result would be to hobble the supersonic aircraft as an instrument of national and world transportation." *Reprinted in Answering Brief of the Port Authority of New York and New Jersey as Amicus Curiae* 12a.

Evaluated on a nationwide basis, night curfews on aircraft operations would cause massive disruption of the

* Perhaps revealing some doubt about considering only the specific impact of one curfew, the United States has added a footnote saying that "in considering the specific impact of a curfew ordinance, it would be appropriate to consider it in relation to other existing curfews" (Br. 56 n.49). Under this approach, the first curfew or the first few curfews might be valid, but not those subsequently enacted. Constitutionality should not depend upon which city acts first.

air transport system, constituting an unreasonable burden on interstate commerce (F.F. 61-84; A. 394-401).

C. It is a straw man for the United States to say "we do not believe that maintenance of an effective national air transportation system requires prohibiting a curfew at every airport" and "we do not think that all airports need be treated alike" (Br. 56). Appellees do not contend that all airports must be treated alike as to night curfews, but rather that such decisions must be made by a national agency. Moreover, the findings detailing the "near catastrophic effect" of a Burbank-type curfew were based upon nationwide imposition, not at all airports, but only at airports comparable to Hollywood-Burbank which have scheduled interstate air carrier operations (A. 396). The district court did not hold that all airports were to be treated alike, but rather that airspace management was a phase of the national commerce requiring regulation by a single authority (A. 373).

D. The United States' objection that the commerce argument is "predicted upon speculation about ordinances or rules not yet in existence" (Br. 56 n.48) ignores the uncontradicted evidence and findings that curfews, if upheld here, are "contagious" and "would be adopted by virtually all cities surrounding airports" (F.F. 69, A. 396). It also ignores current reports that many cities are considering curfews and awaiting the results of this litigation. See N.Y. Times, Dec. 7, 1972, at 39, Col. 1.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

WARREN CHRISTOPHER

RALPH W. DAU

MICHAEL D. ZIMMERMAN

Attorneys for Appellees

Of Counsel:

O'MELVENY & MYERS

KIBTLAND & PACKARD

February 1973.

Appendix A

Department of Transportation
Federal Aviation Administration
Western Region
Los Angeles, California
3 Aug. 1971

Mr. James S. Mize
Executive Officer
Board of Supervisors
County of Los Angeles
383 Hall of Administration
Los Angeles, California 90012

Dear Mr. Mize:

This is in response to your letter of 23 July 1971 reporting that the Los Angeles County Board of Supervisors has requested a report as to the feasibility of restricting aircraft operations at the airports operated by Los Angeles County between the hours of 11:00 p.m. and 7:00 a.m. Your letter also states that similar restrictions are needed at Los Angeles International Airport and requests our favorable consideration for such restrictions.

Los Angeles County presently operates five general aviation reliever type airports of which four (Compton Municipal, El Monte, Wm. J. Fox Airfield, and Brackett Field) have been developed, in part, by Federal funds totaling over \$5 million. All the airports operated by the County are included in the National Airport Systems Plan and each accommodates fixed base operators, flying schools, and air taxi operators. There are slightly over 1,000 aircraft based at the five airports. The Federal Aviation Administration operates airport traffic service at El Monte and Brackett Field. The latter airport has an

airport traffic control tower constructed with Federal funds by the Federal Aviation Administration at a cost of \$416,000 and ranked 76th out of 336 in the United States for total aircraft operations in 1970.

We recognize the right of the airport proprietor to regulate the use of the airport so long as that regulation is reasonable and nondiscriminatory. In accordance with the requirements in regard to the airports for which Federal funds have been expended, Los Angeles County has agreed in its grant agreements with the Federal Aviation Administration to keep the airports open to all types, kinds, and classes of aeronautical use, and promised not to prohibit or limit such use unless necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public. Your letter does not present any information or evidence to support a determination that closure of all County operated airports between the hours of 11:00 p.m. and 7:00 a.m. is necessary from a safety standpoint or required by the civil aviation needs of the public. In fact, to discontinue use of these airports for one third of the time would obviously be a substantial loss to aviation and the public interest.

As you probably know, the legality of airport curfew laws is involved in *Lockheed Air Terminal, Inc. et al v. City of Burbank*, 318 F. Supp. 914 (C.D. Cal. 1970), presently on appeal to the Ninth Circuit United States Court of Appeals from the judgment of the United States District Court for the Central District of California. In essence the District Court concluded that air transportation "is a uniquely national operation in which the Federal interest is so dominant as to preclude the enforcement of state or local laws such as the Burbank Curfew Ordinance, on the same subject." The District Court held that the Burbank Curfew Ordinance was in conflict with the Federal statutes and regulations, that it constituted an invalid attempt to regulate national commerce, and

that enforcement of the ordinance would result in an intolerable and unreasonable burden on interstate commerce. In reaching this conclusion, Judge Crary carefully considered a previous California case entitled *Stagg v. Municipal Court*, 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (1969) and found that it was distinguishable and unpersuasive. That case involved an ordinance passed by the City of Santa Monica which restricted jet aircraft take-offs from the Santa Monica Municipal Airport between the hours of 11:00 p.m. and 7:00 a.m. The Federal Aviation Administration believes that the decision of the United States District Court in *Lockheed Air Terminal v. City of Burbank* is correct and we have filed an Amicus Curiae brief in support of that decision in the Ninth Circuit.

In regard to Los Angeles International Airport which is owned and operated by the City of Los Angeles, we have received no information that would indicate that Los Angeles intends to adopt a curfew ordinance or that one is necessary. Noise abatement flight procedures and preferential runway use procedures have been applicable and used at Los Angeles International Airport for some years. In order to acquaint you with these procedures, I am taking the liberty of enclosing a copy of the affidavit by Mr. Donald J. Haugen, Chief, Los Angeles Tower — Terminal Radar Control, which contains detailed information concerning those procedures currently in effect. We believe that other restrictions, particularly the type described in your letter, would place an intolerable burden on air transportation and air commerce, and would be detrimental not only to the City of Los Angeles but to the County of Los Angeles.

Under the circumstances, we would not look favorably on any restriction of aircraft operations such as being studied by the Los Angeles County Board of Super-

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visors. We will be glad to discuss this matter with the Board at any time or provide them with additional information as needed.

Sincerely,

/s/ Arvin O. Basnight

ARVIN O. BASNIGHT
Director

Appendix B

Department of Transportation
Federal Aviation Administration
Western Region
Los Angeles, California
2 February 1972

Mr. Joseph D. Patello
Port Attorney
San Diego Unified Port District
3165 Pacific Highway
San Diego, California 92112

Dear Joe:

Thank you for your letter of 23 December 1971 advising me of the discussions and pressures to impose a night curfew on airport operations or to close the passenger terminal building at Lindbergh Field, San Diego, California, International Airport from midnight to 6:00 A.M. As you point out, a number of the facilities at Lindbergh Field have been constructed with Federal financial assistance presently totaling about two million dollars, including \$104,000 to remodel the old terminal building. Present requests for additional aid by the San Diego Unified Port District, filed under the Federal Airport and Airways Development Act, amount to about 1.6 million dollars. In the prior executed agreements for Federal aid the Port has assured the Federal Government that the airport will remain open to all types, kinds, and classes of aeronautical use except under certain specified conditions. The term "airport" is defined in both the Federal Airport Act and the Federal Airport and Airways Development Act to include airport buildings.

Basically the FAA is opposed to any type of night curfew at airports which would have an effect on the national air transportation system. In summary, our legal position has been that the Federal Government has preempted the authority to regulate the efficient use of the

airspace and to regulate aircraft noise and, therefore, the imposing of a night curfew by others is invalid and unconstitutional. This position has been clearly set forth in the amicus curiae briefs filed in the *Lockheed Air Terminal, Inc. v. City of Burbank* case in the United States District Court and the United States Court of Appeals, copies of which I am enclosing.

Contrary to popular belief there is no curfew at Washington National Airport. The FAA does have a voluntary agreement with the scheduled air carriers and other users to limit turbojet operations, but it should be borne in mind that Dulles International Airport and Baltimore International Airport are available without limitation to service the same metropolitan area, a situation which does not exist at San Diego. Furthermore, the Administrator in taking such action in regard to Washington National Airport is not only exercising his authority as a proprietor but is doing so only as he deems necessary to insure the efficient utilization of the airspace and to protect the public from unnecessary aircraft noise.

I have deliberately delayed answering your letter awaiting the 9th Circuit Decision in *Burbank* which is expected momentarily inasmuch as the case was submitted in early November 1971. In addition, I would assume that there would be no rush to take any action of the type contemplated which might affect air transportation services during the Republican National Convention in August.

Please advise me in regard to any developments and thank you once again for your letter.

Sincerely,

Original signed by
Ned K. Zartman

NED K. ZARTMAN
Regional Counsel

Appendix C

Department of Transportation
Federal Aviation Administration
Eastern Region
New York, N. Y.
22 Feb. 1972

Chairman, Committee on Industry and Economic
Development
New York State Assembly
New York State Capitol
Albany, New York 12224

Dear Mr. Chairman:

There has come to our attention your Bill No. 8839, proposing to amend the General Business Law to prohibit takeoff and landing of aircraft at airports between 11:00 p.m. and 7:00 a.m.

We view the proposal as attempting to control the operation of aircraft and use of the navigable airspace, functions which are the particular domain of the Federal Government [*American Airlines v. Town of Hempstead*, Affd. 398 F 2d 369 (CA-2) Cert denied 393 US 1017]. For reasons set forth in the cited case, we consider the proposed legislation to be unconstitutional.

Should you desire further elaboration of our views, you may wish to contact our Regional Counsel, Area Code 212, 995-2815.

Sincerely,

Original signed by:
Robert H. Stanton

GEORGE M. GARY
Director

Appendix D

Department of Transportation
Federal Aviation Administration
Southwestern Region
10 May 1972

Mr. Joseph A. Foster, Director
Department of Aviation
City of Houston
Houston Intercontinental Airport
2800 Terminal Road
Houston, Texas 77060

Dear Mr. Foster:

Your letter of 28 April 1972 requested our advice concerning proposed restrictions on scheduled commercial air carrier operations at William P. Hobby Airport, Houston, Texas.

As you know, §308(a) of the Federal Aviation Act of 1958, as amended [49 U.S.C. §1349(a)] provides that there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended. Additionally, each of the various Federal Airport Aid Projects (FAAP) which have been completed under the Federal Aid for Public Airport Development Program [69 U.S.C. §1101, et seq.] for the William P. Hobby Airport contain assurances from the City of Houston to the effect that the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination. In this connection, our records indicate that the City of Houston has received some \$4,799,032 of FAAP funds for various projects in connection with the Hobby Airport.

For the sake of convenience, the following are our comments in the same order as your proposed restrictions.

1. Restriction of Hobby Airport to scheduled commercial air carrier operations using aircraft having *not more than two jet engines* would, in our opinion, be discriminatory against Braniff Airlines for the reason that Braniff would be utilizing either Boeing 720's (which have four jet engines) or Boeing 727's (which have three jet engines). In this connection, it is apparent that the proposed restriction would have no effect on the current operations of Southwest Airlines which is operating Boeing 737's (which have two jet engines). For the foregoing reason, we would strongly recommend that the City of Houston not adopt this proposed restriction.

2. Restrict scheduled commercial air carrier operations to flights having "first landing" destinations of *not more than 300 nautical miles* from the Hobby Airport. Since this restriction would apply equally to all scheduled air carriers, we feel that it would be *the least objectionable* of all the proposed restrictions; however, we would be remiss if we failed to point out this type of restriction could become discriminatory in a very short time owing to rapid changes in the field of air transportation. This being so, while we would interpose no objection to the restriction at this time, the situation could change and require us to change our views at a later date. In this connection, it is my understanding that the City desires to strengthen this restriction by making it applicable to flights having "ultimate" destinations. If this were to be done, it would clearly discriminate against Braniff Airlines, as well as other interstate carriers, because Southwest Airlines is an intrastate carrier. Therefore, if this change were to be made, we would have to recommend against its adoption.

3. Impose a curfew on scheduled commercial air carrier operations at Hobby Airport the effect of which would restrict flights into and out of the airport during the hours from 8:00 p.m. to 6:00 a.m. While it is true that

a few airports in the United States have found it necessary to impose this type of curfew because of the threat of ruinous litigation, our feeling is that the curfew, if allowed to proliferate, will ultimately have a deleterious affect on the National Aviation System because of its "ripple" effect. The Federal Aviation Administration is now making a general study of curfews to see what steps can be taken to minimize the many serious problems that inevitably arise as the use of curfews become more widespread. For this reason, we consider the proposed curfew at Hobby Airport as premature and, therefore, would strongly recommend against its adoption at this time.

I greatly appreciate this opportunity to give you my thoughts on the matter. I hope the foregoing will be of some assistance to you.

Sincerely,

Original Signed By
Henry H. Newman

Director

Appendix E**Economic Impact of Night Curfews at Airports**

10 March 1972

From: EC-200 [FAA Director of Aviation Economics]

To: EQ-1 [FAA Director of Environmental Quality]

Subj: Economic Impact of 'Night Curfews at Airports

The airlines, the airport operators, and the public who use air transportation would be significantly affected by the imposition of night curfews at United States airports. Utilization would drop particularly in the larger long-haul aircraft. Capacity in high density markets would decrease and peaking at the major airports would be intensified. The result would be increased costs to the airlines, increased airport delays, and increased prices for the purchase of air transportation.

In order to measure the impact of an eight-hour curfew on the airline industry, an analysis of the November 1971 Official Airline Guide Schedule Tape was completed. The 141 U.S. airports enplaning 100,000 or more air carrier passengers in 1970 were examined in detail. These airports accounted for over 95 percent of the total U.S. passenger traffic. Ten percent of the air carrier operations at these airports occurred during the period 2200-0559 local time.

Table 1 is a summary of the night operations by type of service ranked by airport. The top five airports experienced 763 night operations which were 29 percent of the total. The top 15 airports represent over 50 percent of the total night operations. This table highlights the high concentration of total night operations at a few key airports and also the relative magnitude of night operations at these locations. Cargo operations at five stations accounted for 41 percent of the total night cargo

flights. At these five airports, 62 percent of the total cargo frequencies operated at night.

**ALL-CARGO FREQUENCIES
AT TOP FIVE AIRPORTS**

	2200-0559	Daily	Night as Percent of Day
ORD (O'Hare)	103	157	66
JFK (Kennedy)	76	132	58
LAX	44	81	54
(Los Angeles)			
DTW (Detroit)	38	62	61
EWR (Newark)	32	42	76
	<u>293</u>	<u>474</u>	<u>62%</u>

Significant international night operations occur at only two airports — JFK with 21 and RNL with 10. This is 60 percent of the total international night flights for all the airports, but represent only 11 percent of the total daily operations at these two airports.

The following table is the percent distribution of total night operations by type of service:

Domestic Trunk	50%
Cargo	27%
Local Service	19%
International	2%
Commuter	2%

Any supplemental or commuter airline that does not publish a schedule in the Official Airline Guide is not included in these counts.

Table 2 is a summary of the U.S. air carrier production of scheduled frequency and revenue airplane miles flown by passenger aircraft, for domestic trunk and local service airlines showing night operations as a percent of total day. This table highlights the longer average stage-

length of night operations versus the stage length for total daily operations. Ten percent of the operations occur during curfew, however, 13 percent of the revenue miles flown occur during this period. Tables 3, 4, 5, and 6 contain the detail back-up by carrier for Table 2. Fourteen percent of the domestic trunk revenue passenger airplane mileage flown — close to 18 percent of the service over 1,000 miles — would be curtailed or forced to be rescheduled by the imposition of airport curfews. This would imply a significant drop in average aircraft utilization and eventually require an increased fleet size to provide the necessary lift to accommodate the demand for air transportation. These increased equipment costs would have to be passed on to the airline passenger.

Tables 3 and 5 also reflect the large amount of off-peak flying in night coach service offered by Delta and Eastern Airlines.

Exhibit 1 is a graph of the hourly distribution of the 1,000 daily operations scheduled at Los Angeles International Airport. Assuming that we could reschedule all the night operations such that each hour during the 0600-2159 time span would be approximately equal, we would increase the number of operations in all but three hours during the day.

Exhibit 2 reflects this revised hourly distribution of the 1,000 daily operations at Los Angeles.

Table 7 lists the number of flights by destination that would have to be rescheduled at Los Angeles in order to comply with a *national* curfew. This number (223 flights) is greater than shown in Table 1 (134) because it includes flights that fall within the 0600-2159 time span at Los Angeles but violates the curfew at the destination point. This table reflects the concentration of night operation to a limited number of destinations.

Table 8 examines the passenger schedules between Los Angeles and Chicago O'Hare Airport. There are four competitors certificated to fly nonstop between Los Angeles and Chicago. Table 9 summarizes by hour the 42 flights and over 7,500 seats being offered daily in this market. Approximately 34 percent of the eastbound and 20 percent of the westbound capacity would be affected by a curfew. This is visually portrayed by Exhibit 3. The effective curfew hours at Los Angeles for Chicago flights are: eastbound departures 1600-0559 and westbound arrivals 2200-0759.

The Air Transport Association, as well as others, have expressed concern about the possibility of airport curfews being imposed and their impact on the industry. These data would seem to indicate that curfews would have a profound economic effect. A number of airlines currently have computer models which are capable of developing airline schedules. We would recommend that the ATA pursue this further and establish an airline committee which could utilize these existing models. With this capability, it would arrive at more precise data on additional industry fleet requirements, reduced capacity, increased costs of operation, and additional airport facility requirements as a result of airport curfews.

/s/ Herbert J. Guth

HERBERT J. GUTH

Director of Aviation Economics

(Tables omitted in printing)

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IN THE
Supreme Court of the United States

October Term, 1972

No. 71-1637

THE CITY OF BURBANK, a municipal corporation; DR. JARVEY GILBERT, Mayor; ROBERT R. MCKENZIE, Vice-Mayor; Councilman GEORGE W. HAVEN; Councilman ROBERT A. SWANSON; Councilman D. VERNER GIBSON; JOSEPH N. BAKER, City Manager; SAMUEL GORLICK, City Attorney for the City of Burbank and REX R. ANDREWS, Chief of Police of the City of Burbank,

Appellants,

—VS.—

LOCKHEED AIR TERMINAL, INC., a corporation, PACIFIC SOUTHWEST AIR LINES, a corporation, and AIR TRANSPORT ASSOCIATION OF AMERICA,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF ON BEHALF OF
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
AS AMICUS CURIAE

Preliminary Statement

Purpose of Reply Brief

Air Line Pilots Association, International submits this reply brief solely because of the somewhat belated filing of a 70-page brief by the Solicitor General on behalf of the United States as *amicus curiae*. In spite of a reluctance to burden the Court with an additional brief Air Line Pilots Association, International has concluded that the novel interpretation of legislative history advanced in the Government's brief should not remain unanswered.

ARGUMENT

The legislative history of the 1958, 1968 and 1972 Acts of Congress supports the position of the appellees.

The brief for the United States is primarily devoted to an examination of the legislative history of the various Acts of Congress establishing federal control of air transportation. The argument is there advanced that Congress manifested an intent to permit local and state governments to enforce curfews as a function of their police powers. The difficulty with the argument is that the exhaustive search of the legislative records made by the Solicitor General establishes the contrary of the proposition which it sets out to demonstrate. Almost every citation of legislative history in the brief for the United States shows that the only exception in favor of curfews intended by Congress was in the case of an airport proprietor as a function of the

proprietor's historic right to limit the use of his own property. Faced with this fact of legislative history the Solicitor General has attempted to turn it to his advantage by a secondary argument to the effect that the distinction between curfew as a function of police power and curfew as a function of proprietorship is not valid. The Solicitor General therefore would have this Court conclude that although Congress addressed 'itself to proprietorship the legislative history should be deemed amended as if it had been addressed to police power.

An examination of legislative history is a valid method of ascertaining the intent of Congress with respect to a statute. But when legislative history is ascertained it must be respected. It is a novel and dangerous theory of judicial inquiry to assert that one may rewrite legislative history on the basis of what Congress should have been thinking and then bolster the pleaders' conclusion with the rewritten history. Unhappily this seems to be the net effect of the Solicitor General's brief.

At page 32 the Solicitor General refers to a letter from the Department of Transportation to the Senate Committee. The critical portion of the quotation from that letter reads:

"An action by an *airport proprietor* to exclude aircraft which exceed noise levels established by him does not conflict with the Federal authority to regulate air traffic." (emphasis added)

At page 36 the Solicitor General's brief declares:

"The Committee then quoted at length from the Secretary's letter, which expressed the view that, while regulation of the flight of aircraft with respect to noise was preempted, 'the proposed legislation

will not affect the rights of a State or local public agency, as the *proprietor* of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport.' S. Rep. No. 1353, *supra*, p. 6." (emphasis added)

In footnote 27, following the above quotation, the Solicitor General's brief makes the following acknowledgment:

"The Department's letters to the House and Senate Committees spoke in terms of the powers of local agencies acting as airport '*proprietors*,' and the court of appeals relied upon this as a basis for distinguishing and holding preempted airport control undertaken through exercise of the police power. For reasons discussed more fully at pp. 44-49, *infra*, we do not believe this to be a valid distinction. Hollywood-Burbank Airport is to our knowledge the only privately owned airport in the country used by airlines operating jet aircraft, and the Department's attention was not focused upon the problems of local regulation of privately owned airports." (emphasis added)

In the face of the numerous, plain and unavoidable references to proprietorship, which appear throughout the legislative history, the Solicitor General is obliged at page 44 of his brief to bring his vessel about on a new tack and to argue that "the proprietary-police power distinction relied upon by the Court of Appeals is not valid". The Solicitor General then goes on to argue, at page 45, that the distinction in question "leads to a logically bizarre result" because "nearly every major airport in the United States is governmentally owned".

This is not to ascertain and respect legislative history as the intent of Congress. To the contrary, this is to question the wisdom and to rewrite the intent of Congress. Perhaps Congress intended to adopt an unwise distinction. That would not alter its intent. It is not within the power of the Solicitor General to reeducate and remotivate the Congress retroactively. It is legitimate to ascertain Congressional intent; it is not legitimate to remake it. The "proprietary-police power distinction" was not an innovation made and relied on by the Court of Appeals. It was created and relied upon by Congress. The Court of Appeals correctly acknowledged and respected the intent of Congress as shown by the legislative history.*

Since it is clear that Burbank is not a proprietor but is in fact in conflict with Lockheed, which is the proprietor of the airport, it must be concluded that the attempted exercise of police power by Burbank is in conflict with a pre-empted area of federal authority.

* It should be observed that, viewed correctly, Congress did not act irrationally, nor is the result of the proprietary-police power distinction "bizarre". As stated at page 7 of the Answering Brief of the Port Authority of New York and New Jersey as *Amicus Curiae*, Congress intended to do no more than to respect an ancient "common law right which inheres to the owner and operator of land." For Congress to respect an incident of property ownership is reasonable. What is unreasonable, indeed bizarre, is to argue that to respect such a landlord's right necessarily implies a congressional intention to permit the states and each of the multiple subdivisions surrounding most airports to exercise the police power. So as to avoid any premature conclusion on an otherwise unbriefed point, it should be noted that neither the extent of the airport proprietors' rights nor the extent, if any, of their conflict with Federal regulations, has been adjudicated. The Port Authority of New York and New Jersey regulations, referred to in its answering brief (p. 6), "are expressly subordinate to the FAA rules and do not profess to authorize or direct anything not authorized under the FAA rules, regulations and Tower bulletin". *American Airlines, et al. v. Town of Hempstead*, 272 F. Supp. 226, 233-234.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

SAMUEL J. COHEN

*Attorney for
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International, Amicus Curiae*

Of Counsel:

COHEN, WEISS AND SIMON

Proof of Service

I, SAMUEL J. COHEN, a member of the Bar of the Supreme Court of the United States, and attorney for Air Line Pilots Association, International, appearing herein, *Amicus Curiae*, hereby certify that on the 9th day of February, 1973, I served copies of the foregoing brief on counsel for Appellants, counsel for Appellees, counsel for the State of California, *Amicus Curiae*, counsel for the United States, *Amicus Curiae*, counsel for the National Business Aircraft Association, Inc., *Amicus Curiae*, and counsel for The Port Authority of New York and New Jersey, *Amicus Curiae*, by mailing three copies thereof in a duly addressed envelope, first class postage prepaid, to each of the following in this cause (air mail to each counsel a distance of 500 miles or more):

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1637

City of Burbank et al.,

Appellants,

v.

Lookheed Air Terminal

Inc. et al.

On Appeal from the United States Court of Appeals for the Ninth Circuit.

[May 14, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Court in *Cooley v. Board of Wardens*, 12 How. 200, first stated the rule of pre-emption which is the critical issue in the present case. Speaking through Justice Curtis, it said:

"Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation. . . . Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." *Id.*, at 319.

This suit brought by appellees asked for an injunction against the enforcement of an ordinance adopted by the City Council of Burbank, California, which made it unlawful for a so-called pure jet aircraft to take off from

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the Hollywood-Burbank Airport between 11 p. m. of one day and 7 a. m. the next day, and making it unlawful for the operator of that airport to allow any such aircraft to take off from that airport during such periods.¹ The only regularly scheduled flight affected by the ordinance was an intrastate flight of Pacific Southwest Airlines originating in Oakland, California, and departing from Hollywood-Burbank Airport for San Diego every Sunday night at 11:30 p. m.

The District Court found the ordinance to be unconstitutional on both Supremacy Clause and Commerce Clause grounds. — F. Supp. —. The Court of Appeals affirmed on the grounds of the Supremacy Clause both as respects pre-emption and as respects conflict.² 457 F. 2d 667. The case is here on appeal. 28 U. S. C. § 1254 (2). We noted probable jurisdiction. 409 U. S. 840. We affirm the Court of Appeals.

The Federal Aviation Act of 1958, 72 Stat. 737, 49 U. S. C. § 1301 *et seq.*, as amended by the Noise Control Act of 1972, 86 Stat. 1234, and the regulations under it, 14 CFR Pts. 71-77, 91-97, are central to the question of pre-emption.

¹ Burbank Municipal Code § 20-32.1. The ordinance provides an exception for "emergency" flights approved by the City Police Department.

² The Court of Appeals held that the Burbank ordinance conflicted with the runway preference order, BUR 7100.5B, issued by the FAA Chief of the Airport Traffic Control Tower at the Hollywood-Burbank Airport. The order stated that "[p]rocedures established for the Hollywood-Burbank airport are designed to reduce community exposure to noise to the lowest practicable minimum. . . ." The Court of Appeals concluded that the ordinance "interferes with the balance set by the FAA among the interests with which it is empowered to deal, and frustrates the full accomplishment of the goals of Congress." 457 F. 2d, at 676. In view of our disposition of this appeal under the doctrine of pre-emption, we need not reach this question.

Section 1508 provides in part, "The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States" By § 1348 the Administrator of the Federal Aeronautics Act (FAA) has been given broad authority to regulate the use of the navigable airspace, "in order to insure the safety of aircraft and the efficient utilization of such airspace . . ." and "for the protection of persons and property on the ground. . . ."

The Solicitor General, though arguing against pre-emption, concedes that as respects "airspace management" there is pre-emption. That, however, is a fatal concession, for as the District Court found: "The imposition of curfew ordinances on a nationwide basis would result in a bunching of flights in those hours immediately preceding the curfew. This bunching of flights during these hours would have the twofold effect of increasing an already serious congestion problem and actually increasing, rather than relieving, the noise problem by increasing flights in the period of greatest annoyance to surrounding communities. Such a result is totally inconsistent with the objectives of the federal statutory

* Section 1348 provides in relevant part as follows:

"(a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. . . . (c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects."

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and regulatory scheme. It also found "[t]he imposition of curfew ordinances on a nationwide basis would cause a serious loss of efficiency in the use of the navigable airspace."

Curfews, such as Burbank has imposed, would according to the testimony at the trial and the District Court's findings increase congestion, cause a loss of efficiency, and aggravate the noise problem. FAA has occasionally operated curfews. See *Virginians for Dulles v. Volpe*, 344 F. Supp. 573. But the record shows that FAA has consistently opposed curfews, unless managed by it, in the interests of its management of the "navigable airspace."

As stated by Judge Dooling in *American Airlines v. Hempstead*, 272 F. Supp. 236, 230, aff'd, 398 F. 2d 369:

"The aircraft and its noise are indivisible; the noise of the aircraft extends outward from it with the same inseparability as its wings and tail assembly; to exclude the aircraft noise from the Town is to exclude the aircraft; to set a ground level decible limit for the aircraft is directly to exclude it from the lower air that it cannot use without exceeding the decible limit."

The Noise Control Act of 1972, 86 Stat. 1234, which was approved October 27, 1972, provides that the Administrator "after consultation with appropriate Federal, State, and local agencies and interested persons" shall conduct a study of various facets of the aircraft "noise" problems and report to the Congress within nine months,* i. e., by July 1973. The 1972 Act by amending § 611 of

*Section 7 (a) provides:

"The Administrator, after consultation with appropriate Federal, State, and local agencies and interested persons, shall conduct a study of the (1) adequacy of Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission stand-

the Federal Aviation Act,* also involves the Environmental Protection Agency (EPA) in the comprehensive scheme of federal control of the aircraft noise problem. Under the amended § 611 (b)(1) the FAA, after consulting with EPA, shall provide "for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension or revocation of any certificate authorized by this title."* Section 611 (b)(2) as amended provides that future certificates for

aircraft on new and existing aircraft, together with recommendations on the retrofitting and phaseout of existing aircraft; (3) implications of identifying and achieving levels of cumulative noise exposure around airports; and (4) additional measures available to airport operators and local governments to control aircraft noise. He shall report on such study to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committees on Commerce and Public Works of the Senate within nine months after the date of the enactment of this Act."

*Section 611 of the Federal Aviation Act, 49 U. S. C. § 1431, was added in July 1968. Act of July 21, 1968, Pub. L. 90-411, 82 Stat. 395. Prior to amendment by the 1972 Act, it provided in part that the Administrator, "[i]n order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, . . . shall proscribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom." 49 U. S. C. § 1431 (a).

*Section 611 (b)(1) as amended reads:

"In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall proscribe and amend standards for the measurement of aircraft noise and sonic boom and shall proscribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title. No exemption with respect to any standard

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aircraft operations shall not issue unless the new aircraft noise requirements are met." Section 611 (c)(1) as amended provides that not later than July 1973 EPA shall submit to FAA proposed regulations to provide such "control and abatement of aircraft noise and sonic boom" as EPA determines is "necessary to protect the public health and welfare." The FAA is directed within 30 days to publish the proposed regulations in a notice of proposed rule making. Within 60 days after that publication FAA is directed to commence a public hearing on the proposed rules. Section 611 (c)(1). That subsection goes on to provide that within "a reasonable time after the conclusion of such hearing and after consultation with EPA," FAA is directed either to prescribe the regulations substantially as submitted by EPA, or prescribe them in modified form, or publish in the Federal Register a notice that it is not prescribing any regulation in response to EPA's submission together with its reasons therefor.

Section 611 (c)(2) as amended also provides that if EPA believes that FAA's action with respect to a regulation proposed by EPA "does not protect the public

or regulation under this section may be granted under any provision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted."

' Subsection (b)(2) provides:

"The FAA shall not issue an original type certificate under section 603 (a) of this Act for any aircraft for which substantial noise abatement can be achieved by prescribing standards and regulations in accordance with this section, unless he shall have prescribed standards and regulations in accordance with this section which apply to such aircraft and which protect the public from aircraft noise and sonic boom, consistent with the considerations listed in subsection (d)."

health and welfare from aircraft noise or sonic boom," EPA shall consult with FAA and may request FAA to review and report to EPA on the advisability of prescribing the regulation originally proposed by EPA. That request shall be published in the Federal Register; FAA shall complete the review requested and report to EPA in the time specified together with a detailed statement of FAA's findings and the reasons for its conclusion and shall identify any impact statement filed under § 102 (2)(C) of the National Environmental Policy Act of 1969,^{*} 83 Stat. 853, 42 U. S. C. § 4332, with

^{*}Section 102 (2)(C) of the National Environmental Policy Act of 1969, 42 U. S. C. § 4332, reads as follows:

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall— . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on— (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes."

Section 611 (c)(3) of the Federal Aviation Act, as amended provides that if FAA files no statement under § 102 (2)(c) of the Na-

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respect to FAA's action. FAA's action, if adverse to EPA's proposal, shall be published in the Federal Register.

Congress did not leave FAA to act at large but provided in § 611 (d) as amended particularized standards:

"In prescribing and amending standards and regulations under this section, the FAA shall—

"(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this Act and the Department of Transportation Act;

"(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

"(3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

"(4) consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

"(5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section."

The original complaint was filed on May 14, 1970;

tional Environmental Policy Act "then EPA may request the FAA to file a supplemental report, which shall be published in the Federal Register within such a period as EPA may specify (but such time specified shall not be less than ninety days from the date the request was made), and which shall contain a comparison of (A) the environmental effects (including those which cannot be avoided) of the action actually taken by the FAA in response to EPA's proposed regulations, and (B) EPA's proposed regulations."

the District Court entered its judgment November 30, 1970; and the Court of Appeals announced its judgment and opinion March 22, 1972—all before the Noise Control Act of 1972 was approved by the President on October 22, 1972. That Act reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, pre-empting state and local control.

There is to be sure no express provision of pre-emption in the 1972 Act. That, however, is not decisive. As we stated in *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230:

"Congress legislated here in a field which the States have traditionally occupied. . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . . Or the state policy may produce a result inconsistent with the objective of the federal statute."

It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption. As Justice Jackson stated con-

curing in *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292, 303:

"Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls."

Both the Senate and House Committees included in their Reports clear statements that the bills would not change the existing pre-emption rule. The House Report stated: "No provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of the State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill." The Senate Report stated: "States and local governments are preempted from establishing or enforcing noise emission standards for aircraft unless such standards are identical to standards prescribed under this bill. This does not address responsibilities or powers of airport operators, and no provision of the bill is intended to alter in any way the relationship between the authority of the Federal government and that of State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill."

These statements do not avail appellants. Prior to the 1972 Act, § 611 (a) provided that the Administrator

* H. R. Rep. No. 92-842, 92d Cong., 2d Sess., p. 10.

¹⁴ S. Rep. No. 92-1160, 92d Cong., 2d Sess., pp. 10-11.

"shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom." 82 Stat. 395. Under § 611 (b)(3) the Administrator was required to "consider whether any proposed standard, rule, or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest." 82 Stat. 395. When the legislation which added this section to the Federal Aviation Act¹¹ was considered at Senate hearings, Senator Monroney (the author of the 1958 Act) asked Secretary of Transportation Boyd whether the proposed legislation would "to any degree preempt State and local government regulation of aircraft noise and sonic boom."¹² The Secretary requested leave to submit a written opinion, and in a letter dated June 22, 1968, he stated:

"The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. . . . H. R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft."

According to the Senate Report,¹³ it was "not the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local govern-

¹¹ See n. 5, *supra*.

¹² Hearing before the Aviation Subcommittee of the Senate Committee on Commerce on S. 707 and H. R. 3400, Aircraft Noise Abatement Regulation, 90th Cong., 2d Sess., 29.

¹³ S. Rep. No. 1353, 90th Cong., 2d Sess., 6.

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ments," and the Report concurred in the views set forth by the Secretary in his letter.¹⁴

The Senate version of the 1972 Act as it passed the Senate contained an express pre-emption section.¹⁵ But the Senate version never was presented to the House. Instead, the Senate passed, with amendments, the House version;¹⁶ the House, also with amendments, then concurred in the Senate amendments.¹⁷ The Act as passed combined provisions of both the House and Senate bills on the subject that each had earlier approved. When the blended provisions of the present Act were before the House, Congressman Staggers, Chairman of the

¹⁴ The letter from the Secretary of Transportation also expressed the view that "the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports on the basis of noise considerations so long as such exclusion is nondiscriminatory." (Emphasis added.) This portion as well was quoted with approval in the Senate Report. *Ibid.*

Appellants and the Solicitor General submit that this indicates that a municipality with jurisdiction over an airport has the power to impose a curfew on the airport, notwithstanding federal responsibility in the area. But, we are concerned here not with an ordinance imposed by the City of Burbank as "proprietor" of the airport, but with the exercise of police power. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. For example, the principal airport serving Cincinnati is located in Kentucky. Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits if any apply to a municipality as a proprietor.

¹⁵ 118 Cong. Rec. 8, 17989 (Oct. 13, 1972).

¹⁶ *Id.*, at S. 18007 (Oct. 13, 1972).

¹⁷ *Id.*, at H. 10287 (Oct. 18, 1972).

House Commerce Committee, in urging the House to accept the amended version, said: ¹⁸

"I cannot say what industry's intention may be, but I can say to the gentleman what my intention is in trying to get this bill passed. We have evidence that across America some cities and States are trying to do [sic] pass noise regulations. Certainly we do not want that to happen. It would harass industry and progress in America. That is the reason why I want to get this bill passed during this session."

When the House approved the blended provisions of the bill, Senator Tunney moved that the Senate concur. He made clear ¹⁹ that the regulations to be considered by EPA for recommendation to FAA would include:

"... proposed means of reducing noise in airport environments through the application of emission controls on aircraft, the regulation of flight patterns and aircraft and airport operations, and *modifications in the number, frequency, or scheduling of flights* [as well as] ... *the imposition of curfews on noisy airports*, the imposition of flight path alterations in areas where noise was a problem, the imposition of noise emission standards on new and existing aircraft—with the expectation of a retrofit schedule to abate noise emissions from existing aircraft—the *imposition of controls to increase the load factor on commercial flights, or other reductions in the joint use of airports*, and such other procedures as may be determined useful and necessary to protect public health and welfare." (Emphasis added.)

¹⁸ *Id.*, at H. 10294 (Oct. 18, 1972).

¹⁹ *Id.*, at S. 18644 (Oct. 18, 1972).

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The statements by Congressman Staggers and Senator Tunney are weighty ones. For Congressman Staggers was Chairman of the House Committee on Interstate and Foreign Commerce which submitted the Noise Control Act and Report; and Senator Tunney was a member of the Senate Committee on Public Works, which submitted the Act and Report.

When the President signed the bill he stated that "many of the most significant sources of noise move in interstate commerce and can be effectively regulated only at the federal level."²⁰

Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question. Cf. *Hines v. Davidowitz*, 312 U. S. 52; *Huron Portland Cement Co. v. Detroit*, 362 U. S. 440. Control of noise is of course deep-seated in the police power of the States. Yet the pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for local curfews or other local controls. What the ultimate remedy for aircraft noise which plagues many communities and tens of thousands of people is not known. The procedures under the 1972 Act are underway.²¹ In addition, the Administrator has imposed

²⁰ 8 Weekly Comp. Pres. Docs. 1582, 1583.

²¹ The Administrator has adopted regulations prescribing noise standards which must be met as a condition to type certification for all new subsonic turbojet-powered aircraft. 14 CFR Pt. 36. On January 30, 1973, the Federal Aviation Administration gave advance notice of proposed rulemaking for the control of fleet noise levels (FNL) of airplanes operating in interstate commerce. 38 Fed. Reg. 2760. (The regulations would not pertain to carriers also operating in foreign commerce.) The proposed rules are designed to limit FNL prior to July 1, 1978, when the covered aircraft become subject to the requirements of 14 CFR Pt. 36. -

The FNL would be determined as a function of the takeoff and approach noise level of each airplane in the fleet and the number of

a variety of regulations relating to takeoff and landing procedures and runway preferences. The Federal Aviation Act requires a delicate balance between safety and efficiency, 49 U. S. C. § 1348 (a), and the protection of persons on the ground, 49 U. S. C. § 1348 (c). Any regulations adopted by the Administrator to control noise pollution must be consistent with the "highest degree of safety." 49 U. S. C. § 1431 (d)(3). The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.

If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of the FAA in controlling air traffic flow.²² The difficulties of scheduling flights to avoid congestion and the con-

takeoffs and landings of the fleet. Until July 1, 1976, the cumulative noise level of any fleet subject to regulation could not exceed the FNL during the previous 90-day base period. In 1976 each fleet would be required to reduce its FNL by 50% of the difference between the original base-period level and the level ultimately required by 14 CFR Pt. 36.

²² In order to insure efficient and safe use of the navigable airspace, the FAA uses centralized "flow control," regulating the number of aircraft that will be accepted in a given area and restricting altitudes and routes that may be flown. Flow control has resulted in the Los Angeles Air Route Traffic Control Center holding aircraft on the ground at the Hollywood-Burbank Airport.

Prior to April 1970, 21 regional Air Route Traffic Control Centers exercised independent control over traffic flow in their areas. In April 1970 the FAA established a Central Flow Facility to coordinate flow control throughout the Air Traffic Control system. This change was necessitated because no regional center "had enough information to make a judgment based on the overall condition of the ATC system. . . ." Fourth Annual Report of the Secretary of Transportation for Fiscal Year 1970.

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comitant decrease in safety would be compounded. In 1960 the FAA rejected a proposed restriction on jet operations at the Los Angeles airport between 10 p. m. and 7 a. m. because such restrictions could "create critically serious problems to all air transportation patterns." 25 Fed. Reg. 1764-1765. The complete FAA statement said:

"The proposed restriction on the use of the airport by jet aircraft between the hours of 10 p. m. and 7 a. m. under certain surface wind conditions has also been reevaluated and this provision has been omitted from the rule. The practice of prohibiting the use of various airports during certain specific hours could create critically serious problems to all air transportation patterns. The network of airports throughout the United States and the constant availability of these airports are essential to the maintenance of a sound air transportation system. The continuing growth of public acceptance of aviation as a major force in passenger transportation and the increasingly significant role of commercial aviation in the nation's economy are accomplishments which cannot be inhibited if the best interest of the public is to be served. It was concluded therefore that the extent of relief from the noise problem which this provision must have achieved would not have compensated the degree of restriction it would have imposed on domestic and foreign Air Commerce.

This decision, announced in 1960, remains peculiarly within the competence of the FAA, supplemented now by the input of the EPA. We are not at liberty to diffuse the powers given by Congress to FAA and EPA by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 71-1637

City of Burbank et al.,
Appellants,

v.

Lockheed Air Terminal
Inc. et al.

On Appeal from the United
States Court of Appeals for
the Ninth Circuit.

[May 14, 1973]

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, dissenting.

The Court concludes that congressional legislation dealing with aircraft noise has so "pervaded" that field that Congress has *impliedly* pre-empted it, and therefore the ordinance of the city of Burbank here challenged is invalid under the Supremacy Clause of the Constitution. The Court says that "we need not, however, dwell long on the earlier versions of the Federal Aviation Act, for a 1972 Act put the question completely at rest." *Ante*, at —. Yet the House and Senate committee reports explicitly state that the 1972 Act to which the Court refers was *not* intended to alter the balance between state and federal regulation which had been struck by earlier congressional legislation in this area. The House Report, H. R. Rep. No. 92-842, in discussing the general pre-emptive effect of the entire bill, stated:

"The authority of State and local government to regulate use, operation or movement of products is not effected at all by the bill. (The preemption provision discussed in this paragraph does not apply to aircraft. See discussion of aircraft noise below.)" *Id.*, at 8.

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The report went on to state specifically:

"No provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill." *Id.*, at 10.

The report of the Senate Public Works Committee, S. Rep. No. 92-1160, expressed the identical intent with respect to pre-emption:

"States and local governments are preempted from establishing or enforcing noise emission standards for aircraft [see *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226 (E.D. N. Y. 1967)], unless such standards are identical to standards prescribed under this bill. This does not address responsibilities or powers of airport operators, and no provision of the bill is intended to alter in any way the relationship between authority of the Federal Government and that of State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill." *Id.*, at —, 1972 U. S. Cong. and Administrative News, 4663.

In the light of these specific congressional disclaimers of pre-emption in the 1972 Act, reference must necessarily be had to earlier congressional legislation on the subject.¹ It was on the basis of these earlier enact-

¹ Statements or comments of individual Senators or Representatives on the floor of either House are not to be given great, let alone controlling, weight in ascertaining the intent of Congress as a whole, see, e. g., *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 474 (1921); *McCoughn v. Hershey Chocolate Co.*, 283 U. S. 488, 494, (1931); cf. *Wright v. Mountain Trust Bank*, 300 U. S. 440, 464 (1937). This guidance is particularly appropriate in this case, as

ments that the Court of Appeals concluded that Congress had pre-empted the field from state or local regulation of the type that the city of Burbank enacted.

The Burbank ordinance prohibited jet take-offs from the Hollywood-Burbank Airport during the late evening and early morning hours. Its purpose was to afford local residents at least partial relief, during normal sleeping hours, from the noise associated with jet airplanes. The ordinance in no way dealt with flights over the city, cf. *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226 (E.D. N. Y. 1967), affirmed, 398 F. 2d 369 (CA2 1968), cert denied, 393 U. S. 1017 (1969), nor did it categorically prohibit all jet take-offs during those hours.

Appellees do not contend that the noise produced by jet engines could not reasonably be deemed to affect adversely the health and welfare of persons constantly exposed to it; control of noise, sufficiently loud to be classified as a public nuisance at common law, would be a type of regulation well within the traditional scope of the police power possessed by States and local governing bodies. Because noise regulation has traditionally been an area of local, not national, concern, in determining whether congressional legislation has, by implication, foreclosed remedial local enactments "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). This assumption derives from our basic constitutional division of legislative competence between the States and Congress; from "due regard for the pre-suppositions of our embracing federal system, including the principle of diffusion of power not as a matter

the statements of two individual Congressmen quoted in the Court's opinion are at odds with the views expressed in the committee reports.

of doctrinaire localism but as a promoter of democracy" *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 243 (1959) (emphasis added). Unless the requisite pre-emptive intent is abundantly clear, we should hesitate to invalidate state and local legislation for the added reason that "the State is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden." *Penn Dairies, Inc. v. Milk Control Commission*, 318 U. S. 261, 275 (1943).

Since Congress' intent in enacting the 1972 Act was clearly to retain the status quo between the federal regulation and local regulation, a holding of implied pre-emption of the field depends upon whether two earlier congressional enactments, the Federal Aviation Act of 1958, 72 Stat. 737, 49 U. S. C. § 1301, *et seq.*, and the 1968 Noise Abatement Amendment to that Act, 49 U. S. C. § 1431, manifested the clear intent, to preclude local regulations, that our prior decisions require.

The 1958 Act was intended to consolidate in one agency in the Executive Branch the control over aviation that had previously been diffused within that branch. The paramount substantive concerns of Congress were to regulate federally all aspects of air safety, see, *e. g.*, 49 U. S. C. § 1422 and, once aircraft were in "flight," airspace management, see, *e. g.*, 49 U. S. C. § 1348 (a). See S. Rep. No. 1811, 85th Cong., 2d Sess., pp. 5-6, 13-15. While the Act might be broad enough to permit the Administrator to promulgate take-off and landing rules to avoid excessive noise at certain hours of the day, see 49 U. S. C. § 1348 (c), Congress was not concerned with the problem of noise created by aircraft and did not intend to pre-empt its regulation. Furthermore, while Congress clearly intended to pre-empt the States from regulating aircraft in flight, the author of the bill, Senator Monroney, specifically stated that the FAA would

not have control "over the ground space" of airports.²

The development and increasing use of civilian jet aircraft resulted in congressional concern over the noise associated with those aircraft. Hearings were held over a period of several years, resulting in a report but no legislation. The report of the House Committee on Interstate and Foreign Commerce, H. R. Rep. No. 36, 88th Cong., 1st Sess., shows clearly that the 1958 Act was thought by at least some in Congress neither to pre-empt local legislative action to alleviate the growing noise problem, nor to prohibit local curfews:

"Until Federal action is taken, the local governmental authorities must be deemed to possess the police power necessary to protect their citizens and property from the unreasonable invasion of aircraft noise. The wisdom of exercising such power or the manner of the exercise is a problem to be resolved on the local governmental level.

"Airports in the United States, as a general rule, are operated by a local governmental authority, either a municipality, a county, or some independent unit. These airport operators are closer, both geographically and politically, to the problem of the conflict of interests between the citizens who have been adversely affected by the aircraft noise and the needs of the community for air commerce. Some airport operators have exercised the proprietary right to restrict in a reasonable manner, the use of any runway by limiting either the hours which it may be used or the types of civil transport aircraft that

² Hearings before the Subcommittee on Aviation of the Senate Committee on Interstate and Foreign Commerce, on S. 3880, Federal Aviation Agency Act, 85th Cong., 2d Sess., p. 279.

may use it." H. R. Rep. No. 36, 88th Cong., 1st Sess., p. 3.

Several years after the conclusion of these hearings, Congress enacted the 1968 Noise Abatement Amendment, 82 Stat. 395, to the 1958 Act, 49 U. S. C. § 1431, which was the first congressional legislation dealing with the problem of aircraft noise. On its face,² the present

²"(a) Consultations; standards; rules and regulations.

"In order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, the Administrator of the Federal Aviation Administration, after consultation with the Secretary of Transportation, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards, rules, and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this subchapter.

"(b) Considerations determinative of standards, rules, and regulations.

"In prescribing and amending standards, rules, and regulations under this section, the Administrator shall—

"(1) consider relevant available data, relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this chapter and chapter 23 of this title;

"(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

"(3) consider whether any proposed standard, rule, or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

"(4) consider whether any proposed standard, rule, or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

"(5) consider the extent to which such standard, rule, or regulation will contribute to carrying out the purposes of this section.

"(c) Amendment, modification, suspension, or revocation of certificate; notice and appeal rights.

"In any action to amend, modify, suspend, or revoke a certificate in which violation or aircraft noise or sonic boom standards, rules, or

§ 611 neither pre-empts the general field of regulation of aircraft noise nor deals specifically with the more limited question of curfews. The House Committee on Interstate and Foreign Commerce, after reciting the serious proportions of the problem, outlined the type of federal regulation that the Act sought to impose:

"The noise problem is basically a conflict between two groups or interests. On the one hand, there is a group who provide various air transportation services. On the other hand there is a group who live, work, and go to schools and churches in communities near airports. The latter group is frequently burdened to the point where they can neither enjoy nor reasonably use their land because of noise resulting from aircraft operations. Many of them derive no benefit from the aircraft operations which create unwanted noise. Therefore, it is easy to understand why they complain, and complain most vehemently. The possible solutions to this demanding and vexing problem which appear to offer the most promise are (1) new or modified engine and airframe designs, (2) special flight operating techniques and procedures, and (3) planning for land use in areas adjacent to airports so that such land use will be most compatible with aircraft operations. *This legislation is directed toward the primary problem; namely, the reduction of noise at its source.*" (Emphasis added.) H. R. Rep. No. 1463, 90th Cong., 2d Sess., at 4.

regulations is at issue, the certificate holder shall have the same notice and appeal rights as are contained in section 1429 of this title, and in any appeal to the National Transportation Safety Board, the Board may amend, modify, or reverse the order of the Administrator if it finds that control or abatement of aircraft noise or sonic boom and the public interest do not require the affirmation of such order, or that such order is not consistent with safety in air commerce or air transportation."

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Far from indicating any total pre-emptive intent, the House Committee observed:

"Rather, the committee expects manufacturers, air carriers, all other segments of the aviation community, and State and local civic and governmental entities to continue and increase their contributions toward the common goal of quiet." *Ibid.*

The Senate Commerce Committee's view of the House bill followed a similar vein:

"This investment by the industry is representative of one of the avenues of approach to aircraft noise reduction, that is, the development of aircraft which generate less noise. Another approach to noise reduction is through the establishment of special flight operating techniques and procedures. The third principal control technique which merits serious consideration is the planning for land use in areas near airports so as to make such use compatible with aircraft operations. This is a matter largely within the province of State and local governments. While all of these techniques must be thoroughly studied and employed, the first order of business is to stop the escalation of aircraft noise by imposing standards which require the full application of noise reduction technology.

"A completely quiet airplane will not be developed within the foreseeable future. However, with the technological and regulatory means now at hand, it is possible to reduce both the level and the impact of aircraft noise. Within the limits of technology and economic feasibility, it is the view of the committee that the Federal Government must assure that the potential reductions are in fact realized." S. Rep. No. 1353, 90th Cong., 2d Sess., at 2-3.

With specific emphasis on pre-emption, the Senate Committee observed:

"Relation to Local Government Initiatives

"The bill is an amendment to a statute describing the powers and duties of the Federal Government with respect to air commerce. As indicated earlier in this report, certain actions by State and local public agencies, such as zoning to assure compatible land use, are a necessary part of the total attack on aircraft noise. In this connection, the question is raised whether this bill adds or subtracts anything from the powers of State or local governments. It is not the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local governments.

"In this regard, we concur in the following views set forth by the Secretary in his letter to the Committee of June 22, 1968:

"The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines v. Town of Hempstead*, 272 F. Supp. 226 (US DC, E. D., N. Y. 1966). The court said, at 231, "The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source." H. R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local

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governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.

"However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

"Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.

"Of course, the authority of units of local government to control the effects of aircraft noise through the exercise of land use planning and zoning powers is not diminished by the bill.

"Finally, since the flight of aircraft has been pre-empted by the Federal Government, State and local governments can presently exercise no control over sonic boom. The bill makes no change in this regard." *Id.*, at 6-7.

In terms of pre-emption analysis, the most reasonable reading of § 611 appears to be that it was enacted to enable the Federal Government to deal with the noise problem created by jet aircraft through study and regulation of the "source" of the problem—the mechanical and structural aspects of jet and turbine aircraft design. The authority to "prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom," 49 U. S. C. § 1431 (a), while a broad grant of authority to the Administrator, cannot fairly be read as prohibiting the States from enacting every type of measure, which might have the effect of reducing aircraft noise, in the absence of a regulation to that effect under this section. The statute established exclusive federal control of the technological methods for reducing the output of noise by jet aircraft, but that is a far cry from saying that it prohibited any local regulation of the times at which the local airport might be available for the use of jet aircraft.

The Court of Appeals found critical to its decision the distinction between the local government as airport proprietor and the local government as a regulatory agency, which was reflected in the views of the Secretary of Transportation outlined in the Senate Report on the 1968 Amendment. Under its reasoning, a local government unit that owned and operated an airport would not be pre-empted by § 611 from totally, or, as here, partially, excluding noisy aircraft from using its facilities, but a municipality having territorial jurisdiction over the airport would be pre-empted from enacting an

ordinance having a similar effect. If the statute actually enacted drew this distinction, I would of course respect it. But since we are dealing with "legislative history," rather than the words actually written by Congress into law, I do not believe it is of the controlling significance attributed to it by the court below.

The pre-emption question to which the Secretary's letter was addressed related to "the field of noise regulation insofar as it involves controlling the *flight* of aircraft" (emphasis added), and thus included types of regulation quite different from that enacted by the city of Burbank that would be clearly precluded. See *American Airlines, Inc. v. Town of Hempstead, supra*. But more important is the highly practical consideration that the Hollywood-Burbank Airport is probably⁴ the only airport in the country used by federally certified air carriers that is not owned and operated by a state or local government. There is no indication that this fact was brought to the attention of the Senate Committee, or that the Secretary of Transportation was aware of it in framing his letter. It simply strains credulity to believe that the Secretary, the Senate Committee, or Congress intended that all airports except the Hollywood-Burbank Airport could enact curfews.

Considering the language Congress enacted into law, the available legislative history, and the light shed by these on the congressional purpose, Congress did not intend either by the 1958 Act or the 1968 Amendment to oust local governments from the enactment of regulations such as that of the city of Burbank. The 1972

⁴ The record is not exactly clear on this point, but it does appear to be the case. Although there are several airports owned by municipalities or other governmental units that are located outside of the boundaries of the units, there does not appear to be any other privately owned airport, at which certified air carriers operate, in the country.

Act quite clearly intended to maintain the status quo between federal and local authorities. The legislative history of the 1972 Act, quite apart from its concern with avoiding additional pre-emption, discloses a primary focus on the alteration of procedures within the Federal Government for dealing with problems of aircraft noise already entrusted by Congress to federal competence. The 1972 Act set up procedures by which the Administrator of the Environmental Protection Agency would have a role to play in the formulation and review of standards promulgated by the Federal Aviation Administration dealing with noise emissions of jet aircraft. But because these agencies have exclusive authority to reduce noise by promulgating regulations and implementing standards directed at one or several of the causes of the level of noise, local governmental bodies are not thereby foreclosed from dealing with the noise problem by every other conceivable method.

A local governing body that owned and operated an airport is certainly not, by the Court's opinion, prohibited from permanently closing down its facilities. A local governing body could likewise use its traditional police power to prevent the establishment of a new airport or the expansion of an existing one within its territorial jurisdiction by declining to grant the necessary zoning for such a facility. Even though the local government's decision in each case were motivated entirely because of the noise associated with airports, I do not read the Court's opinion as indicating that such action would be prohibited by the Supremacy Clause merely because the Federal Government has undertaken the responsibility for some aspects of aircraft noise control. If this may be done, the Court's opinion surely does not satisfactorily explain why a local governing body may not enact a far less "intrusive" ordinance such as that of the city of Burbank.

The history of congressional action in this field demonstrates, I believe, an affirmative congressional intent to allow local regulation. But even if it did not go that far, that history surely does not reflect "the clear and manifest purpose of Congress" to prohibit the exercise of "the historic police powers of the States" which our decisions required before a conclusion of implied pre-emption is reached. Clearly Congress could pre-empt the field to local regulation if it chose, and very likely the authority conferred on the Administrator of the Federal Aviation Administration by 49 U. S. C. § 1431 is sufficient to authorize him to promulgate regulations effectively pre-empting local action. But neither Congress nor the Administrator has chosen to go that route. Until they do, the ordinance of the city of Burbank is a valid exercise of its police power.

The District Court found that the Burbank ordinance would impose an undue burden on interstate commerce, and held it invalid under the Commerce Clause for that reason. Neither the Court of Appeals nor this Court's opinion, in view of their determination as to pre-emption, reached that question. The District Court's conclusion appears to be based at least in part on a consideration of the effect on interstate commerce that would result if all municipal airports in the country enacted ordinances such as that of Burbank. Since the proper determination of the question turns on an evaluation of the facts of each case, see, e. g., *Bibb v. Navajo Freight Lines, Inc.*, 359 U. S. 520 (1959), and not on a predicted proliferation of possibilities, the District Court's conclusion is of doubtful validity. The Burbank ordinance did not affect emergency flights, and had the total effect of prohibiting one scheduled commercial flight each week and several additional private flights by corporate executives; such a result can hardly be held to be an unreasonable burden

on commerce. Since the Court expresses no opinion on the question, however I refrain from any further analysis of it.*

* Although cited by the Court, this situation is clearly not a *Cooley* situation, in which the control of aircraft noise "admit[s] of one uniform system, or plan of regulation, [which] may justly be said to be of such a nature as to require exclusive legislation by Congress." *Cooley v. Board of Wardens*, 12 How. 299, 319. The court below also held, but by a divided vote, that the Burbank ordinance was invalid because it was in conflict with a clearly articulated federal policy, to wit, a *non-mandatory* runway preference order of the FAA tower chief at Burbank which requested pilots to use a particular runway at night. The Court does not decide this case on that ground; I see no occasion to express in detail my views on the conflict issue, except to note my doubt as to the correctness of the disposition of that question.